EDITOR'S NOTE

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(1)

. 85-5238-CSY
atus: GRANTED

Title: Major Crane, Petitioner
v.
Kentucky

cketed:
gust 12, 1985

Court: Supreme Court of Kentucky

Counsel for petitioner: Heft Jr., Frank W.

Counsel for respondent: Gillig, John S.

try	Date	Note	Proceedings and Orders
1	Aug 12 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 12 1985		DISTRIBUTED. September 30, 1985
4	Sep 12 1985		Waiver of right of respondent Kentucky to respond filed.
5	Oct 2 1985	F	Response requested.
6	Nov 1 1985		Brief of respondent Kentucky in opposition filed.
7	Nov 7 1985		REDISTRIBUTED. November 27, 1985
9	Dec 2 1985		REDISTRIBUTED. December 6, 1985
1	Dec 9 1985		Petition GRANTED.
			**********
2	Jan 21 1986		Joint appendix filed.
3	Jan 23 1986		Brief of petitioner Major Crane filed.
4	Feb 18 1986		Record filed.
5	Feb 18 1986		Certified original record, 17 volumes, received.
6	Feb 22 1986		Brief of respondent Kentucky filed.
7	Mar 14 1986		SET FOR ARGUMENT, Wednesday, April 23, 1986. (3rd case)
8	Mar 14 1986		CIRCULATED.
9	Mar 27 1986	X	Reply brief of petitioner Major Crane filed.
1	Apr 23 1986		ARGUED.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. , Misc., October Term, 1984

MAJOR CRANE, JR.,

Petitioner,

V.

COMMONWEALTH OF KENTUCKY,

Respondent.

85-5238

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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CERTIFICATE

I hereby certify that a copy of this Petition was served by depositing same in a United States Postal Service Mailbox, with first-class postage prepaid and addressed to Mr. John Gillig, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on August 12, 1985.

J. DAVID NIEHAUS
COUNSEL FOR PETITIONER

29 pp

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, Major Crane, Jr., prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Kentucky in his case.

QUESTION PRESENTED

IN A CRIMINAL CASE, DOES A STATE TRIAL COURT DENY A DEFENDANT HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT REFUSES TO PERMIT HIM TO PRESENT TO THE JURY THE FACTS RELATING TO THE BELIEVABILITY OF HIS CONFESSION AND THE WEIGHT TO BE GIVEN IT WHEN THOSE SAME FACTS HAVE BEEN CONSIDERED AND DETERMINED CONCLUSIVELY BY THE TRIAL JUDGE IN HIS PRE-TRIAL DETERMINATION OF THE ADMISSIBILITY OF THE CONFESSION.

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No written opinion was rendered by the Jefferson County, Kentucky, Circuit Court. Following a jury trial, Petitioner was convicted of wanton murder [Ky. Rev. Stat. 507.020], and was sentenced to 40 years imprisonment by judgment dated January 5, 1984. (TR, 178-180) (Appendix, p. 15).

By Opinion rendered on February 28, 1985, the Supreme Court of Kentucky affirmed Petitioner's conviction. (Appendix, p. 1). Timely Petition for Rehearing was denied on June 13, 1985. (Appendix, p. 14). The Opinion of the Supreme Court of Kentucky, styled Major Crane v. Commonwealth of Kentucky is found at 690 S.W.2d 753 (1985).

JURISDICTION

This case is presented to the Court pursuant to 28 U.S.C. §1257(3) for denial of Petitioner's rights arising under the Constitution. The Petition for Rehearing in the Supreme Court of Kentucky was denied on June 13, 1985, ending the proceedings in that Court. This Petition is, therefore, timely filed pursuant to Sup.Ct.R. 20.4.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arose from a suspected hold-up that occurred in a liquor store on August 7, 1981. The clerk, Randall Todd, was found shot in the head and subsequently he died from the wound. Investigating officers developed no leads on the case until August 14, 1981, when Petitioner, who had been arrested for a burglary of a tire store, suddenly confessed to shooting the clerk. (Supp., 7; 10).[1] Crane had been transported to a Louisville City Police District substation for processing after arrest on the burglary charge. While the police officer was typing an arrest record slip, Crane "just out of the clear blue sky" said "I confess." (Supp., p. 10). On further inquiry by the police officer, Crane confessed to robbing a hardware store. Officer Burbrink "...just looked at him and I really didn't pay him too much mind." (Supp., 10). Crane then confessed to shooting a police officer and robbing some people at a bowling alley. This apparently interested Officer Burbrink because he had his superiors contact the Jefferson County Police to investigate the leads provided by Crane's information. (Supp., 10-11). Burbrink continued to talk to Crane to develop more of the particulars of each crime. However, Crane denied knowledge of the liquor store robbery in which Randall Todd had been killed. (Supp. 11). Petitioner had not committed any of the crimes to which he confessed. (Supp., 14, 19).

In compliance with Kentucky law, Petitioner was taken to juvenile detention center. At the center, Petitioner told police about the hardware store robbery. According to Burbrink, Peititioner said

> ...'The guy hit a buzzer and an alarm went off and I shot up in the air' At that time, I said, 'Well, there was nobody shot at Brown Hardware.' He said, 'No, I am talking about Keg Liquors.' He said, 'That is where I am talking about is at Keg Liquors where that guy got killed. (Supp., 14).

The police then began questioning Crane in earnest, and, of course, the statement obtained was used at the trial of this case.

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1. The testimony of the police officer describing this confession is set out in the Appendix to this Petition at pages 18-29.

The story told in the statement was that Major and another boy saw a robbery take place at the Algonquin Manor Shopping Center. Petitioner decided to go home and get his guns, a sawed-off shotgun and a .357 caliber pistol so he could commit a robbery too. (TE, II, 15-16). On the way, he ran into his uncle, George Howard Williams, who had recently lost his job and who needed money. Together, they planned a robbery in which Williams would pretend to buy something, and then Crane would run in and announce a hold-up (TE, II, 16). This plan was followed, but the clerk looked like he had set off an alarm and then "sirens and stuff started going off and I shot up in the air." (TE, II, 16). Major Crane claimed that he got about $300-400 from the robbery of the liquor store (TE, II, 16).

This story varied in several respects from the facts found out by police in their investigation. The robbery occurred at 10:30-10:40 p.m. on August 7. An investigation showed that no money was taken and that the bullet that killed Todd was a .32 caliber instead of a .357 caliber. (TE, II, 31-33). There was no alarm or buzzer system in the liquor store (TE, II, 35). As to the bullet size, Detectives Burbrink and Branham stated that Crane had corrected himself after the taped interview was concluded. (TE, II, 45, 30).

Based on Petitioner's statement, the police also arrested George Howard Williams. He was interviewed and gave a tape-recorded statement which tape was played at trial. Williams denied any wrong-doing, but stated that Crane came into the liquor store armed with a pistol and told the clerk it was a hold-up. As the man turned away Major fired. (TE, IV, 10). Williams fled the store without taking his purchase. Petitioner got into the car Williams was driving and they left the scene. According to Williams, Major was 16 at the time. The pistol he used was a .32 caliber revolver. (TE, IV, 11).

The last out-of-court statement taken was that of Geraldine Crane, Major's mother. She spoke to a Louisville police detective the day after Major was arrested. This statement was recorded by the detective and read by him at trial. Ms. Crane said that Major had told her that he shot a man but that he didn't know the man had died until that day he was arrested. (TE, IV, 62).

These statements were used at trial because Petitioner did not testify and both Williams and Geraldine Crane denied knowing anything about the robbery or Major Crane's part in it. (TE, III, 15; 43; IV, 55). There were no disinterested eyewitnesses to the shooting at Keg Liquors so the statements constituted the only direct evidence linking Petitioner with the crime.[2] The evidence of the statements was introduced through the police officers who had taken them. The remaining witnesses established the cause of death and described the layout of the liquor store.

Petitioner moved to suppress the oral statement (TR, 36), and received a hearing before the trial commenced. The trial court overruled and pursuant to R.Cr. 9.78, entered its findings and conclusions in the record of the case. The judge found that the delay in taking Crane to the detention center was not inordinate and that Petitioner was sufficiently intelligent and mature to appreciate what he was doing. (Supp., 73-75). The trial court rejected the claim of threats or coercion as well as the suggestion that the police officers had coached Petitioner as to what to say (Supp., 75).

In his opening statement at trial, counsel for Petitioner advised the jury that the incredibility of Crane's recorded statement could be shown through internal inconsistencies and through the circumstances under which the statement was given. (TE, I, 16). The prosecutor made no objection at this time. However, before the [illegible] of evidence the next day, Respondent's trial counsel moved in limine to prevent Crane from producing any evidence concerning the circumstances under which the statement was given. (TE, II, 3). The trial court sustained the motion on the ground that the voluntariness had been settled and that pursuant to R.Cr. 9.78 no further inquiry was permissible. (TE, II, 6-7) (App. p. 30-35).

As noted above, the statements of Major Crane, Williams and Geraldine Crane were put into evidence. In his own defense, Petitioner produced two witnesses who noticed a blond, white male

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2. A Patrick Holder was called to testify about what Major Crane had told him concerning the robbery. However, he didn't know when Crane had spoken to him and the exact incident spoken of. (TE, II, 59-60).

leaving the vicinity of Keg Liquors at about the time the police were arriving to investigate the shooting. (TE, V, 3-5; 9-11).

The jury found Crane guilty of wanton murder (Ky.Rev.Stat. 507.020) and recommended 40 years imprisonment. (TR, 129; TE, VI, 56).

A motion for new trial was filed by Petitioner in which he maintained that under Lego v. Twomey, 404 U.S. 477 (1972), the right of the defendant to introduce evidence concerning the believability of a confession remained unchanged by the requirement to have a hearing on its admissibility. (TR, 157; 162) (App. 37). Petitioner also cited cases from a number of jurisdictions following the "orthodox" rule showing that evidence pertaining to voluntariness should also be admitted when it bore on the truthfulness of the confession. (TR, 165-166; App. 46). The motion for new trial was overruled.

On direct appeal to the Supreme Court of Kentucky, Petitioner raised as his sole ground of error the refusal of the trial judge to allow his attorneys to adduce evidence of the circumstances under which his confession was taken to attack the believability of the statement. The refusal of the trial judge to permit cross-examination, it was argued, denied Petitioner the Sixth Amendment right to confront the witnesses against him and also denied due process of law by denying him the opportunity to conduct his defense. Petitioner relied on the balancing test of Chambers v. Mississippi, 410 U.S. 284 (1973). After oral argument, the Supreme Court of Kentucky rendered an Opinion which affirmed the conviction. The decision of that Court was based on its determination that the excluded testimony related only to the voluntariness of the confession and that, in any case, it is too dangerous to put evidence of the type involved here before the jury because the jury may misuse it. [Crane v. Commonwealth, Ky., 690 S.W.2d 753, 755 (1985)] (Appendix, p. 5). By timely Petition for Rehearing, Crane showed the legitimate purpose of the evidence sought to be admitted and also pointed out that the dangers envisioned by the Supreme Court of Kentucky were inconsequential and contrary to universally held principles of evidence law.

Petitioner again argued that the state evidentiary grounds of the Kentucky Court's Opinion were insufficient to satisfy the balancing test set out in Chambers v. Mississippi, 410 U.S. 284 (1973). The Petition for Rehearing was denied in the Supreme Court of Kentucky on June 13, 1985. Major Crane now seeks relief in this Court.

REASONS FOR REVIEW

This case involves a question that was touched on in Jackson v. Denno, 378 U.S. 368 (1964), and Lego v. Twomey, 404 U.S. 477, 485 (1972), but has never really been resolved. In Lego v.Twomey the Court wrote

> The procedure we established in Jackson was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances. Nothing in Jackson questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since Jackson as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness.

The question that arises from this language is found in the last sentence of the excerpt set out above. The question is whether denial of the opportunity to familiarize the jury with the facts concerning the taking of a confession is solely a matter of state evidentiary law or whether such denial must satisfy the due process of law provision of the Fourteenth Amendment of the Constitution and the confrontation provision of the Sixth Amendment. It is important to note that the quoted language from Lego v. Twomey does not require any court to allow introduction of evidence of the taking of the confession but merely states that the defendant is as free to do so after Jackson as he was before. This imprecise language has now given rise to an application of state law that denies Petitioner a right to make a defense to the charge that was laid against him. As shown in the statement of the case, the Supreme Court of Kentucky has interpreted R.Cr. 9.78, its codified rule mandating a Jackson v. Denno hearing,[3]

3. Crane v. Commonwealth, 590 S.W.2d 753 (Ky., 1985) at page 754.

to prohibit the introduction of evidence concerning the circumstances under which the confession was obtained once the issue of admissibility has been settled in favor of admission. The Supreme Court of Kentucky took the language excerpted from Lego v. Twomey to mean that "[t]he several states are left to their own procedure so long as adequate safeguards are prescribed." [Crane v. Commonwealth, 690 S.W.2d 753, 754 (Ky., 1985)]. It acknowledged Kentucky's adherence to the Wigmore or "orthodox" rule which determines the admissibility of a confession by submitting that question to the trial judge. Once the initial determination is made, according to the Kentucky Court, "in some cases, the jury is permitted to hear the same evidence, usually without the testimony of the defendant, but advised they cannot consider voluntariness but may consider only that evidence which relates to credibility." [Crane v. Commonwealth, 690 S.W.2d at 754]. The Kentucky Court applied the rule to the facts of Petitioner's case first by holding that the excluded testimony dealt solely with voluntariness and then by listing three dangers that it foresaw in allowing the jury to hear evidence about the circumstances under which the confession was obtained. [690 S.W.2d at 755] (App., 5). Obviously, the Kentucky Supreme Court saw no impediment to its particular interpretation of Lego v. Twomey.

However, Petitioner had argued on appeal that he had a due process right to conduct a fair defense and, more specifically, to cross examine police officers who testified about the confession to show that his confession was untrue and unworthy of belief. This argument was premised on the principles announced by the Court in Chambers v. Mississippi, 410 U.S. 284 (1973), to the effect that due process of law (and the Sixth Amendment) require a fair opportunity to defend against the accusation and to cross-examine witnesses. [410 U.S. at 294]. Under the rule of Chambers the right to defend and to cross-examine may be curtailed but only when close examination of the case shows that a legitimate interest of the state requires curtailment. [410 U.S. at 295]. This rule should be incorporated explicitly into the language of Lego v. Twomey to avoid situations in

which a state court impinges on the right to defend and to cross-examine solely as a matter of evidentiary law.

The present case shows the need for an explicit statement of the law. Here the main evidence against Petitioner was his own confession which was introduced through the testimony of a police officer. (TE II, 14-30). Although Petitioner was allowed to show the discrepancies between his story and the facts determined by the police investigation, he was not allowed to show facts that would have shown the likelihood that he would make things up. The tendency of suspects of crime to confess falsely or to confess to crimes about which they know but which they have not committed is well-documented. [1984 Wisconsin Law Review, Note: "Corroborating False Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions," p. 1121 (1984)]. It is, therefore, not unreasonable to submit as much factual information as possible to the jury to allow it to determine if the defendant spoke truthfully at the time of his confession or if, for other purposes, he spoke falsely. It is for the jury to decide whether to believe the out-of-court statement. Typically, the out-of-court statement is introduced by the police officer who secured it. Obviously, the defendant must demonstrate the lack of credibility of the statement (at least in part) by cross- examining the officer. This is what Petitioner sought to do. On avowal he elicited testimony that he had been interrogated for close to two hours by four or five police officers in a small (10' X 12') windowless room without the presence of a lawyer or a family member. (TE V, 15-25). Clearly, such testimony would bear on the voluntariness of the resulting statement but it would also provide the basis of an argument that the story was made up to impress the police. As such, this evidence was clearly relevant to the issue of whether the jury should believe the out-of-court statement. Because it was relevant, the evidence should have been admitted unless there was a legitimate reason to prevent admission.

The Supreme Court of Kentucky set out three reasons why the evidence should not be admitted.

> The dangers inherent in admitting evidence before the jury concerning the circumstances attendant to taking the confession are obvious. We have previously spoken of the difficulty in separation of those factors relating to volun-

> tariness and those relating to credibility, and feel this separation is best vested in the hands of the trial judge and not in the minds of the jurors. Second, the issue of voluntariness is a settled issue, no longer debatable except on appeal. Third, the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with Miranda rights, etc. are excluded. [Crane v. Commonwealth, 590 S.W.2d at 755].

Yet these purported dangers are insubstantial. The Kentucky Supreme Court perceived a difficulty in the jury separating the ideas of voluntariness and credibility and, therefore, determined to prevent the jury from hearing any evidence that might relate to voluntariness. But this goes against universally accepted rules of evidence.

All authorities on evidence law agree that relevant evidence must be admitted to the hearing of the jury unless the danger of unfair prejudice, confusion of issues or waste of the court's time substantially outweighs the probative value of the evidence. [Federal Rules of Evidence, Rule 403, cited in I Weinstein, Federal Rules of Evidence, §403, p. 403-1; McCormick, Hornbook on Evidence Law, 2 Ed., §185, p. 438-441 (1972); I WIGMORE, Evidence, §10a, p. 674 et. seq. (Tiller's Revision, 1983)]. However, the prejudice spoken of in this rule is not merely evidence that damages the chance of success for one party or the other.

> It should be emphasized that prejudice, in this context, means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions; but that cannot be ground for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one. [McCormick, §185, p. 439, n. 31].

Where prejudice cannot be shown, or the prejudice does not substantially outweigh the probative value of the evidence, there is no cause to exclude. The rule of multiple admissibility is an offshoot of the general rule stated above. Where a piece of evidence is admissible for a legitimate evidentiary purpose, the fact that it may prejudice an adversary and may run afoul of some other rule of exclusion will not prevent its admission, unless the prejudice, as that term is defined above, substantially outweighs the probative value. [I WIGMORE, §13, p. 693-694; 701 (Tiller's Revision, 1983)]. As Wigmore's Treatise puts it, "[t]his doctrine, though involving

certain risks, is indispensible as a practical rule." [I WIGMORE, at 694]. "It is uniformly conceded that the instruction of the court suffices" to avoid the risk of misuse of the evidence by the jury. [I WIGMORE, p. 697]. And finally, even though exclusion of evidence is proper in some cases, the "exclusion of relevant evidence for undue prejudice (viz., because of the danger of jury 'misdecision') is a drastic remedy and [the] trial courts should always explore the possibility that the less drastic remedy of a limiting instruction may be sufficient to minimize the danger of jury misdecision to an acceptable level." [I WIGMORE, p. 701-702].

Kentucky has never deviated from acceptance of the principles set out above until this case. The earliest statement of the rule of multiple admissibility is found in Cassidy v. Berkovitz, 169 Ky. 785, 185 S.W. 129 (1916). The rule has been applied primarily in situations involving evidence of former crimes. In Gall v. Commonwealth, Ky., 607 S.W.2d 97, 106 (1980), it was stated:

> It is a settled principle that competent, relevant testimony will not be excluded on the mere ground that it reveals, to the defendant's obvious prejudice, an unrelated crime or crimes.

Kentucky law adheres to the notion of admission of evidence for a limited purpose. It has always been held that an admonition will cause a jury to consider evidence only for the purpose for which it was admitted. In Commonwealth v. Richardson, Ky., 674 S.W.2d 515 (1984), the Supreme Court of Kentucky upheld a procedure in which the trial court is to admonish the jury to limit the effect of a prior felony conviction to witness credibility only despite a previous holding in Cowan v. Commonwealth, Ky., 407 S.W.2d 695, 698 (1966), that "no admonition can really assuage the prejudice that is done to a defendant on the merits of his case by disclosure of past felonies in the name of impugning his credibility..." The belief of the courts in the sophistication and tractability of juries is apparent from the general acceptance of the principle that admonitions will channel potentially prejudicial evidence to the right use.

The Supreme Court of Kentucky cited Lego v. Twomey, 404 U.S. 477 (1972), for the proposition that it is difficult to separate the factors dealing with voluntariness and with credibility. It may first be observed that the overlap is unimportant unless there is a

very substantial chance of prejudice to the prosecutor. Prejudice in this context of course means a substantial chance that the jury would be led to decide on factors other than the evidence presented. In the present case, this would be quite unlikely. The excluded evidence was to be adduced to show how a 16-year old boy might have prevaricated about a robbery and shooting that he had heard about. If there was the possibility of misuse of this evidence, the trial court could have admonished the jury. The jury is deemed amenable to admonition and is presumed capable of setting aside its emotions to achieve a just result.

The fact that the issue of voluntariness is concluded by the trial court's pre-trial findings does not support a rule that would keep relevant information from the jury. The trial court may admonish the jury as to proper use. There is no reason to suppose that the jury would ignore this type of admonition any more than it would any other admonition. Modern trial practice is built on the idea of admissibility for limited purpose. [I WIGMORE, §13, p. 695, note 1, 2nd column]. In the absence of good reason to suspect that the jury would disregard an admonition, this danger seems remote.

The last danger posed by the Court seems more pertinent to the question of voluntariness than to the credibility of the confession. Familiarity with Miranda rights and police interrogation procedures, etc., are matters that are raised when trying to determine whether to admit the confession. In the present case, these matters would have been irrelevant. The point to be made was that Major Crane was making up a story to impress the police, or at least, that he was making up a story. None of the factors mentioned in the Opinion would be relevant to this question. Therefore, the perceived danger does not exist in this case. The perceived danger is very unlikely to happen in any case. If, by cross-examination of a police officer a defendant would create the inference that he was inexperienced in the criminal justice system, a competent prosecutor could by redirect examination or introduction of another witness rebut this inference. The perceived danger is non-existent.

The reasons given by the Supreme Court of Kentucky are contrary to the accepted rules of evidentiary law. These reasons are

not the legitimate state interests spoken about in Chambers v. Mississippi [410 U.S. at 295]. There was no good reason to foreclose Petitioner's cross-examination as to the circumstances surrounding the obtaining of his confession. As noted in the dissent to Crane, the Opinion of the majority is a clear departure from the "orthodox" rule. Citing State v. Orscanin, 266 N.W.2d 880 (Minn., 1978), Justice Leibson noted that under the rule, if the confession is admitted, both it and the evidence surrounding the making of it are presented to the jury for consideration only as to weight and credibility. [Crane, 690 S.W.2d at 757]. This is the accepted practice under the orthodox rule [III WIGMORE, Evidence, §861, p. 580 (Chadbourne Revision, 1970); 21 University of Chicago Law Review, "Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury," 317, 320 (1954); I LaFave & Israel, Criminal Procedure, §10.5 "Suppression Hearing" 799-800 (1984)]. The Surpeme Court of Kentucky had gone beyond the initial determination of admissibility and has taken from the jury the determination of weight and credibility. [Crane v. Commonwealth, 690 S.W.2d at 757, dissent of Leibson, J.]. This departure has occurred because there is no definitive statement of the limit to which a state might go in allocating between the judge and jury the determination of admissibility and the determination of credibility and weight. Neither Jackson v. Denno nor Lego v. Twomey prohibit a state from denying a criminal defendant the opportunity to present to the jury evidence that clearly bears on whether the jury should believe the confession to be true. However, the defendant in a criminal case has a due process right to a fair chance to defend himself. The only way to secure the right in the circumstances presented here is to make an explicit holding that in confession cases the defendant may introduce any evidence relevant to weight and credibility, even if that evidence also bears on voluntariness. The only Court that can make this ruling is this Court. Therefore, the Court is urged to grant the writ prayed for.

Respectfully submitted,

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OF COUNSEL

RENDERED: February 28, 1985
TO BE PUBLISHED

Supreme Court of Kentucky

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH ECKERT, JUDGE
No. 82-CR-1544

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT BY JUSTICE GANT

AFFIRMING

Appellant was convicted of wanton murder of the clerk of a liquor store during a robbery, and sentenced to 40 years imprisonment. The single issue on this appeal concerns a confession by the appellant, and poses a question of first impression.

Prior to trial, appellant moved to suppress his confession pursuant to RCr 9.78, which reads:

> **Rule 9.78. Confessions and searches--Suppression of evidence.**--If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

The trial judge conducted a lengthy hearing and denied the motion to suppress, finding the confession to be voluntary. He made extensive findings of fact and conclusions of law covering the hearing and the contentions of the appellant that: There was no coercion or sweating; there was no overreaching by the interrogating officers; there was no inordinate or undue delay; the detention was normal and not under repressive circumstances; despite his youth, appellant had numerous exposures to the authorities and was "street wise"; and appellant was fully informed of and understood his rights.

At trial, appellant did not testify, but sought to introduce through the interrogating officers, before the jury, the same evidence of the circumstances surrounding the taking of the confession, which evidence was denied upon motion by the Commonwealth.

It is important to note the request of the appellant and the ruling of the court. By avowal testimony and argument to this court, appellant designates that his intention was to elicit such information as the length of time appellant was detained, the size of the room in which he was questioned, the number of officers present, the absence of a member of his family or a social worker, etc. The effect of the ruling of the trial court was that this evidence related solely to voluntariness and would not be admitted. However, the trial court specifically ruled that counsel for appellant could develop any evidence from any source, including the interrogating officers, relating to "credibility and inconsistencies." It is also noteworthy that appellant concedes that he was allowed to fully develop the "inconsistencies and mistakes of fact"

in the confession. However, he contends that, although under our law the jury is not permitted to pass upon the voluntariness issue, the circumstances under which the confession was given should be admitted in order to reflect upon credibility.

The roots of this case are firmly implanted in Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), and Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). These cases, in essence, provide that an accused must be permitted to attack the admissibility of evidence such as a confession or the fruits of a search before that evidence is introduced at trial. The several states are left to their own procedure as long as adequate safeguards are prescribed. Two general categories have evolved through the years which are approved by these two cases. One of these has been designated as the "orthodox" rule, under which Kentucky has cast its lot with the enactment of RCr 9.78. The orthodox rule provides that the trial judge alone shall determine the voluntariness of a confession or the admissibility of the fruits of a search.[1] The other rule is known as the Massachusetts or federal rule, under which the judge makes the original determination of voluntariness and, if the evidence is admitted, the circumstances

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[1]Cf. Diehl v. Commonwealth, Ky., 673 S.W.2d 711 (1984), in which this court held there was no error in excluding testimony before the jury concerning the voluntariness of a consent to search where the judge had ruled, upon substantial evidence, that the consent was voluntary. In this case we ruled that the findings of the judge were conclusive as to the issue raised.

of the confession (or consent to search) are placed in evidence with the advice that the jury may consider the evidence only if it finds that the confession or consent was voluntary.

Under the orthodox rule, a certain procedure has developed. The trial judge first conducts an evidentiary hearing on voluntariness, but is admonished by the United States Supreme Court that the judge cannot consider the reliability, credibility or authenticity of the confession in determining its voluntariness. See Lego v. Twomey, supra, at 404 U.S. 484, 92 S. Ct. 624, Footnote 12. Then, in some cases, the jury is permitted to hear the same evidence, usually without testimony of the defendant, but advised they cannot consider voluntariness but may consider only that evidence which relates to credibility. The Supreme Court acknowledges that these separations are difficult.

The history of these suppression hearings in Kentucky is likewise of importance. Following Jackson v. Denno, supra, this court decided the case of Bradley v. Commonwealth, Ky., 439 S.W. 2d 61 (1969). See also Britt v. Commonwealth, Ky., 512 S.W.2d 496 (1974). This court adopted RCr 9.78, effective January 1, 1978, subsequent to our decision in Bradley, supra, and clearly modifies the procedural requirements announced in that case.

It is the opinion of this court that there was no error in excluding from the jury the circumstances relating

solely to voluntariness. As we said in Diehl v. Commonwealth, supra, the findings of the trial court were conclusive on that issue. In this case, appellant was permitted to show, upon examination of an interrogating officer, that the confession contained a misdescription of the weapon used in the homicide; that it spoke of a burglar alarm when there was none; that it told of taking money from a cash drawer when none was taken, and spoke of a gun being fired which had not been fired. Appellant was permitted to question the officer about suggesting material to the appellant during a break in the taping process. It is our further opinion that the excluded testimony related solely to voluntariness. It did not relate to the credibility of the confession, but to the credibility of the trial judge and his ruling on voluntariness, the latter being the function of the appellate court, not the jury.

The dangers inherent in admitting evidence before the jury concerning the circumstances attendant to taking the confession are obvious. We have previously spoken of the difficulty in separation of those factors relating to voluntariness and those relating to credibility, and feel this separation is best vested in the hands of the trial judge and not in the minds of the jurors. Second, the issue of voluntariness is a settled issue, no longer debatable except on appeal. Third, the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowl-

edge of interrogating procedures, his familiarity with Miranda rights, etc. are excluded.

It is the holding of this court that, once a hearing is conducted pursuant to RCr 9.78 and a finding is made by the judge based upon substantial evidence that the confession was voluntary, that finding is conclusive and the trial court may exclude evidence relating to voluntariness from consideration by the jury when that evidence has little or no relationship to any other issue. This shall not preclude the defendant from introduction of any competent evidence relating to authenticity, reliability or credibility of the confession.

The judgment is affirmed.

All concur except Leibson, J., who dissents and files a dissenting opinion, and Stephenson, J., who did not sit.

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RENDERED: ' bruary 28, 1985
TO BE PUBLISHED

Supreme Court of Kentucky

84-SC-407-MR

MAJOR CRANE — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. JOSEPH ECKERT, JUDGE
(Indictment No. 82-CR-1544)

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE LEIBSON

Respectfully, I dissent. There is no articulable distinction between evidence relative to voluntariness and evidence relevant to credibility. Evidence that a confession was coerced, of physical or psychological intimidation surrounding the taking of the confession, is relevant to its credibility. It bears on its truthfulness.

The fact that the trial judge has already considered the same evidence in making a decision whether to admit or exclude the confession makes no difference. Neither does the fact that under RCr 9.78 it is solely the function of the judge to decide whether to admit the confession.

The jury must still decide guilt. The same evidence that the judge heard in deciding to admit the confession must now be heard a second time before the jury, because the evidence bears on the credibility of the confession, an essential consideration in deciding guilt. The judge's decision about coercion does not

preempt the jury's need to consider evidence about coercion in deciding guilt.

The fundamental principle which we should apply has been summarized in Lawson, Kentucky Evidence Law Handbook, § 1.10(A) (2nd ed. 1984), as follows:

> "Multiple Purposes: Evidence that would be admissible if used by the jury for one purpose but inadmissible if used for another purpose should be admitted when offered for the proper purpose."

The trial judge's decision that the confession was not involuntary, or that he rejects the evidence of coercion, has no bearing on its subsequent use before the jury as relevant to the credibility of the confession.

RCr 9.78 was enacted to bring our procedure in compliance with United States Supreme Court decisions in Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) and its progeny, which includes Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972).

Jackson in 1964 mandated a pretrial hearing procedure at which the trial judge must decide on the admissibility of a confession when challenged as involuntary. Only then will the jury be permitted to consider it. Following Jackson there was confusion as to whether Jackson eliminated any further need for the jury to consider voluntariness as a threshold before considering the confession. But this threshold question has no bearing on the relevance of such evidence to the credibility issue.

During the period while there was confusion about the meaning

of Jackson, we adopted the Bradley rule. Bradley v. Commonwealth, Ky., 439 S.W.2d 61 (1969). This rule gave the accused a second bite at the threshold issue as whether the confession should be entirely disregarded. We stated that even though the trial judge has decided the evidence was admissible:

> "[T]he trial court should admonish the jury not to consider the evidence unless it finds beyond a reasonable doubt that the defendant freely and voluntarily consented . . . ."
> 439 S.W.2d at 64.

The effect of RCr 9.78, effective January 1, 1978, is to eliminate the Bradley procedure, the jury's second bite at the suppression issue. But the 1978 change did not, and could not, restrict the admissibility of evidence regarding the circumstances surrounding the taking of a confession. Once the confession has been admitted into evidence, this evidence is relevant to the weight and credibility of that confession. Our holding to the contrary is not just a matter of misinterpreting RCr 9.78. It is a constitutionally impermissible interference with the accused's right to challenge the credibility of the evidence against him.

Lego v. Twomey, supra, serves to clarify the confusion which followed Jackson v. Denno. It explains that the rule in Jackson does not limit the defendant's right to present the same evidence which the judge has considered and rejected at the time he decided voluntariness when ruling on the admissibility of the confession. Such evidence may be offered once more before the jury, so that the jury may now weigh this same evidence in considering the credibility of the confession, even though the confession has been admitted into evidence. Lego states:

> "A defendant has been as free since Jackson as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief." 404 U.S. at 485-86.

Lego explains the reason that such evidence is admissible a second time as follows:

> "Nothing in Jackson questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence." 404 U.S. at 485.

Thus Lego explains that the United States Supreme Court's purpose in Jackson in requiring a preliminary suppression hearing was to keep confessions from coming before the jury, whether true or false, if involuntarily obtained. The jury must still consider whether the confession is true, and evidence of coercion bears directly on the question. The Supreme Court states that the Jackson "case was not aimed at reducing the possibility of convicting innocent men." Lego, supra at 485. As restated in the headnote to Lego v. Twomey:

> "4. The rule excluding coerced confessions from evidence does not preclude an accused, once his confession is admitted in evidence, from familiarizing the jury with the circumstances surrounding the confession, including facts bearing on its weight and voluntariness, and does not preclude the jury from disregarding a confession which is insufficiently corroborated or otherwise deemed unworthy of belief." 30 L.Ed.2d at 619-20.

The majority opines that there are two rules on this subject, an "orthodox" rule followed in Kentucky and a "Massachusetts or federal rule" which, presumably, is different. There may be room for two procedures; one where the trial judge alone decides on admissibility, and a second where after the trial judge decides to admit the confession, the jury is instructed to consider voluntariness a second time as a threshold before considering the confession. But either way the jury may still consider evidence of coercion as bearing on the weight to be given a confession. The only difference is that in one case there would be no separate instruction to the jury to consider voluntariness as a threshold to be crossed before giving any consideration to the confession.

In Hamilton v. Commonwealth, Ky., 580 S.W.2d 208 (1979), we state:

> "The effect of RCr 9.78 is to obviate the procedural requirement of submitting the issue of voluntariness of a confession to a jury following the determination of that issue by the trial judge. . . . [I]t follows that there was no error in [the trial court's] failure to present the issue of voluntariness to the jury." 580 S.W.2d at 210.

This case says "to present the issue of voluntariness to the jury," but nothing about presenting evidence of coercion to the jury. It means only that there is no need to instruct the jury to consider voluntariness as a threshold issue before considering the confession. This has nothing to do with the duty to admit evidence bearing on the credibility of the confession, and coercion fits squarely under that heading.

State v. Urscanin, 266 N.W.2d 880 (Minn. 1978) illustrates

the meaning of "the so-called 'orthodox rule.'" which Kentucky has adopted. It explains that the court's preliminary hearing considering voluntariness is conclusive as to "whether the confession is admissible." Id. But it further explains:

> "[I]f it is admissible, the court admits it and evidence surrounding the making of the confession. It does not invite the jury to deliberate on the issues relating to admissibility, but only on those relating to weight and credibility." 266 N.W.2d at 881. (Emphasis added.)

We have gone an impermissible step further. We not only withdraw from the jury any further consideration of admissibility, but we also withdraw any further consideration of "those [issues] relating to weight and credibility." Id.

There is an obvious distinction between the situation with regard to voluntariness of a confession and the situation with regard to consent to search. Whether the consent to search was voluntary or not is completely unrelated to the credibility of the evidence obtained in the search. Both situations are the same in that if the trial court finds that the confession was obtained as a result of coercion or the search conducted by coercion, the evidence should be suppressed. The difference is that effecting a search by coercion has no bearing on the credibility of the physical evidence obtained as a result of the search, but obtaining a confession by coercion has a direct bearing on the credibility of the confession. Diehl v. Commonwealth, Ky., 673 S.W.2d 711 (1984), cited in the majority opinion, is not dispositive of the issue before us. It is inapposite.

This case should be reversed and remanded with directions that, regardless of the trial judge's finding of fact as to the admissibility of the confession, the jury should be permitted to consider evidence of coercive circumstances surrounding its taking.

EDITOR'S NOTE

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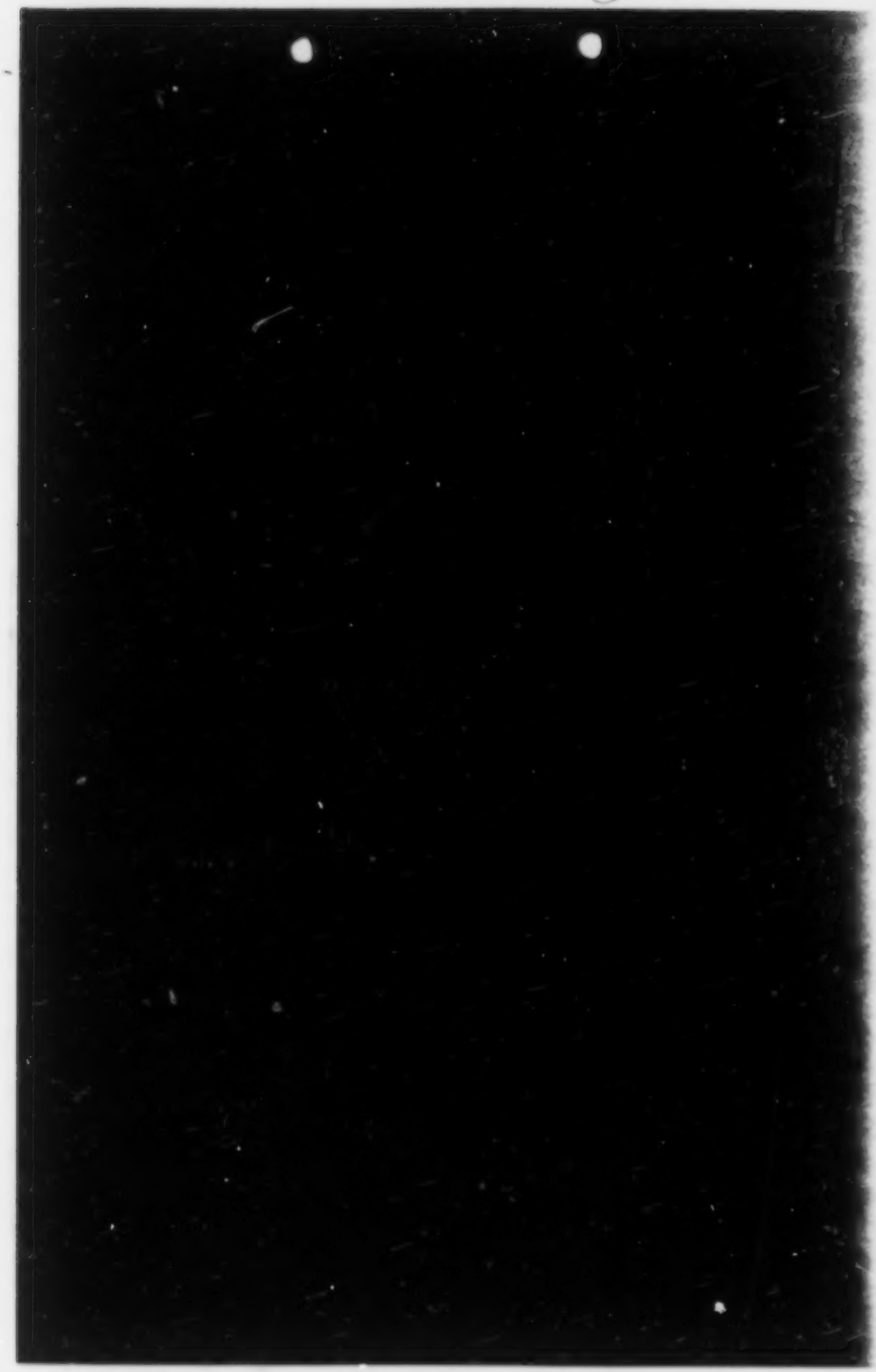

COUNTERSTATEMENT OF THE QUESTION PRESENTED

WHETHER, IN A CRIMINAL CASE, A STATE TRIAL COURT MAY PROPERLY RESTRICT THE INTRODUCTION OF FACTS RELATING TO THE VOLUNTARINESS OF A DEFENDANT'S CONFESSION, ONCE THAT ISSUE HAS BEEN CONCLUSIVELY DETERMINED IN A PRE-TRIAL SUPPRESSION HEARING, WHERE THE DEFENDANT CLAIMS THE SAME FACTS ALLEGED TO SHOW COERCION ALSO SHOW A LACK OF CREDIBILITY.

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OPINION BELOW

The Opinion below is correctly set forth in the petitioner's appendix.

JURISDICTION

The jurisdiction of the Court is properly set forth in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are correctly set forth in the petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth correctly in the petition.

COUNTERSTATEMENT OF THE CASE

The petitioner, Major Crane, was indicted October 13, 1982, for the murder of Randall Todd (Transcript of Record, hereinafter TR, 1). The deceased worked at Keg Liquors, a small liquor store located in Louisville, Kentucky, and was killed by a single bullet wound in the back of the head (Transcript of Evidence, Volume II, hereinafter TE, II 4). Although robbery was suspected as a motive, no money was taken (TE IV 54). After a fruitless investigation, the Louisville police were tipped that Crane was a participant in the burglary of a gas station (Suppression Hearing, hereinafter Sup., 7). Petitioner was picked up on this charge following an eyewitness identification by another participant in the burglary, Patrick Holder (Sup. 7-8). Crane was taken to a police station where he was given his rights and his family was notified (Sup. 9). While one of the officers was filling out an arrest slip, Major Crane suddenly began confessing to a series of crimes, and it was decided to take him to the Youth Bureau in order to investigate further (Sup. 10-11).

At the Youth Bureau petitioner was being questioned about the other robberies when he suddenly confessed to shooting "up in the air" at Keg Liquors, although he knew it was "where that guy got killed" (Testimony of Detective Burbrink, Sup. 14). The detectives then started a tape and recorded petitioner's confession (TE II 14-30).

Pursuant to Kentucky Rule of Criminal Procedure 9.78 a Pretrial Suppression Hearing was held. Crane took the stand in his own behalf, testifying that he was threatened with beatings if he didn't follow the instructions of the police (Sup. 51). According to Crane he was forced to sign a waiver of rights and was told what to say (Id., 51, 58-59). However, the trial court, in its findings, found Petitioner Crane's confession entirely voluntary, holding that: (1) there was no sweating or coercion; (2) there was no delay in taking the petitioner to the Youth Detention Center; (3) in comparing the conflicting testimony between petitioner and the police officers the credibility "lies entirely with the police;" and (4) petitioner has had numerous dealings with the law, is "street wise" and understood his rights (TR 66-67).

At trial, Crane sought to make the most of certain inconsistencies in his confession. The two major inconsistencies were Crane's statement that during the robbery "sirens and stuff started going off and I shot up in the air" and that he "got $300 or $400 out of there." (TE II 16). Later testimony developed the facts that there was no alarm system at Keg Liquors that night (Id. at 35) and that no money was taken (TE IV 54). Crane's confession also included a statement that he had used a .357 caliber weapon, when in fact the weapon used to kill Randall Todd was .32 caliber (TE II 64). According to testimony, however, petitioner later changed his mind about the caliber of the weapon, conceding that it was indeed a .32 (Id., 37 and 46).

Despite these inconsistences there was strong evidence to convict Major Crane. The confession itself was strengthened by his knowledge of what was found at the scene. Detective Burbrink asks:

> 'Did you notice anything on the counter, like maybe someone had just bought something that was in a bag?' Crane replies: 'A half-pint of liquor, that is what it was.' 'What kind was it?' 'It was a half-pint of liquor. I still can't remember what kind it was. It was a half-pint.' (TE II 21-22).

Commonwealth's Exhibit No. 3 is a photograph of the counter of Keg Liquors as it was found by the police. It quite clearly shows a half-pint of liquor, alone on the counter, next to the

cash register (TE IV 49-50). Later testimony indicated that the sale price for that half-pint had been rung up on the cash register but that Randall Todd had been killed before the tax could be added (Id., 48-49). Crane's confession was also buttressed by the statement of George Howard Williams, who had been implicated by petitioner in his own confession (TE II 17). Although Mr. Williams retracted his statement at trial, he had earlier admitted ordering the half-pint which figured so prominently in this case (TE IV 10). Shortly thereafter, Williams stated, petitioner entered the liquor store, said "This is a hold up" and when the man "went to turn to go back to the back Major fired" (Id.). Finally, petitioner's mother made a statement to the police on August 15, 1981, in which she related that during a conversation with Major he stated that he knew that George Williams was involved in the incident at Keg Liquors, that Williams had robbed, shot and killed a man (Id., 60-62).

Crane did not take the stand at trial. Crane did, however, introduce two witnesses whose testimony was virtually identical. Each testified that after they heard the sirens of the police responding to the shooting at Keg Liquors, they looked outside to see what was the matter (TE V, 3 and 11). The first witness, Mary Pablo, then testified that she saw a white man on a street corner opposite Keg Liquors get into a yellow car and, as the car was driven past the location of the witness, a beer bottle was thrown out (Id., 3-5). The second witness, James Powell, Jr., saw only the yellow car and the beer bottle (Id. 9-10). Apparently the jury was intended to believe that the mysterious white man was somehow involved, but there was no evidence to that effect.

Based on this testimony, the jury was instructed on all degrees of homicide (TR 120-127). The jury found

petitioner guilty of Wanton Murder and recommended forty years imprisonment (Id., 129). Major Crane was sentenced to the recommended term on January 5, 1984 (Sentencing Hearing 5).On appeal, Crane raised only one issue; the same issue that is presently before this Court. In an opinion rendered February 28, 1985, the Kentucky Supreme Court affirmed Major Crane's conviction. Crane v. Commonwealth, Ky., 690 S.W.2d 753 (1985). This petition for a writ of certiorari results.

ARGUMENT

THE TRIAL COURT CORRECTLY EXCLUDED PETITIONER'S ATTEMPT TO PLACE BEFORE THE JURY TESTIMONY RELATING TO FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH HAD ALREADY BEEN DECIDED AT A PRETRIAL SUPPRESSION HEARING.

The sole issue raised by Major Crane in his petition is "whether denial of the opportunity to familiarize the jury with the facts concerning the taking of a confession is solely a matter of state evidentiary law or whether such denial must satisfy the due process of law provision of the Fourteenth Amendment of the Constitution and the confrontation provision of the Sixth Amendment" (Petition for writ of certiorari, at 6). The Commonwealth submits that this issue is indeed a matter of state evidentiary law and that the petition should be denied.

Prior to 1942, Kentucky law mandated the submission to the jury of questions regarding the voluntariness of a confession when that confession was attacked under the "Anti-Sweating" Statute. Kentucky Revised Statutes 422.110. In that year an amendment was adopted, the purpose of which was to "abolish this practice [submitting the determination of admissibility to a jury] and to vest this function in the trial

judge." Bass v. Commonwealth, Ky., 177 S.W.2d 386 (1944); Herd v. Commonwealth, Ky., 171 S.W.2d 32 (1943). This amendment to the statute was held constitutional and, under the statute, "no error is committed in failing to submit the question of admissibility of the confession to the jury." Karl v. Commonwealth, Ky., 288 S.W.2d 628 (1956). In Karl, however, the jury was permitted to hear the circumstances of the confession following a determination by the trial judge that the confession was competent and therefore admissible (Id. at 633):

> Either party then has a right to produce before the jury the same evidence which was submitted to the court when the court was called upon to decide the question of competency and admissibility and all other facts and circumstances relevant to the confession or affecting its weight or credit as evidence. (Id.).

Karl is distinguishable from the issue involved in the present case, however, because what was being decided in Karl was not the voluntariness of the confession as a finding or issue of fact, but the admissibility of the confession as a matter of law, leaving a later finding of fact that it was given voluntarily within the province of the jury. This distinction was reiterated in Bradley v. Commonwealth, Ky., 439 S.W.2d 61 (1969), which was used by the Court to bring Kentucky law on search and seizure as well as confessions into conformity with Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Following Jackson, the Kentucky Court of Appeals mandated in Bradley the use of a pretrial suppression hearing and an admonishment to the jury, following a motion to suppress:

> [T]he question of voluntariness (in case of a confession) or consent (in case of a search) should be first determined by the trial judge outside the presence of the jury on the basis of an evidentiary hearing of the pertinent evidence on both sides. Only if the trial court finds the evidence to have been validly obtained is it admissible in evidence before the jury, in which event the trial court should admonish the jury not to consider the evidence unless it finds beyond a reasonable doubt that the defendant freely and voluntarily consented to the search (or, in the case of a confession, that he gave it voluntarily and free of coercion). (Id., at 64).

Again, the trial court made an initial determination that the confession was admissible, and had to then admonish the jury on its consideration of the issue of voluntariness or coercion.

This recitation of prior Kentucky evidentiary law provides the background for the consideration of Kentucky Rule of Criminal Procedure 9.78, which provides:

> If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive. [Emphasis added].

This rule was interpreted in Hamilton v. Commonwealth, Ky., 589 S.W.2d 208 (1979) which held that:

> The effect of RCr 9.78 is to obviate the procedural requirement of submitting the issue of voluntariness of a confession to a jury following the determination of that issue by the trial judge. Consequently, since we have held in this opinion that the trial judge found that appellant's confession is admissible, it follows that there was no error in his failure to present the issue of voluntariness to the jury. The finding of the trial judge is conclusive and an admonition to the jury was unnecessary. (at 210).

Kentucky Rule of Criminal Procedure 9.78, therefore, set Kentucky firmly in the Wigmore or "orthodox" camp which places the determination of the admissibility of a confession in the hands of the trial judge alone. Crane v. Commonwealth, Ky., 690 S.W.2d 753, 754 (1985), affirms this procedure.

Petitioner Crane now challenges one of the logical consequences of this approach. At the close of the suppression hearing the trial court made its "findings resolving the essential issues of fact" surrounding petitioner's confession (Sup., 73-76). Petitioner recognized that a ruling by the trial court on an issue of fact, once decided and supported by substantial evidence, cannot be attacked. For example, petitioner conceded on appeal that he "could not argue to the jury that he was beaten by the police in order to show that his statement was involuntary" (Brief for Appellant, p. 8-9). What petitioner wants to do nevertheless, is to bring in the same evidence used and rejected in the determination that the confession was "voluntary" on the grounds that such evidence would imply that the confession was not "credible."

In Crane v. Commonwealth, supra, the Kentucky Supreme Court rejected this approach, based upon the trial court's ruling that the evidence sought to be excluded related solely to voluntariness. Id., at 754. Because it related solely to voluntariness the evidence was irrelevant. It did not go to the credibility of the confession but was instead an attack on "the credibility of the trial judge and his ruling on voluntariness." Id., at 755.

Under Kentucky law it is well-settled that evidence, to be admissible, must be relevant to prove or disprove a fact in issue. Fitzgerald, Kentucky Practice: Criminal Practice

and Procedure (1978), §867 p. 419, citing Pruitt v. Commonwealth, Ky., 487 S.W.2d 940 (1972); Hartman v. Commonwealth, Ky., 282 S.W.2d 48 (1955). Once the trial court has complied with the mandate of Kentucky Rule of Criminal Procedure 9.78 by holding a suppression hearing and making specific findings of fact and conclusions of law, the Commonwealth submits that it is within the sound discretion of the trial court to limit testimony at trial to facts which are at issue. In the instant case it was obvious from the colloquy between the bench and defense counsel that the trial court fully understood petitioner's contention that the proffered testimony dealt with another issue -- "credibility" -- and specifically rejected it (TE II 307). In Lego v. Towmey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618, 625 (1972), this Court stated the following regarding its decision in Jackson v. Denno, supra:

> The procedure we established in Jackson was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances. Nothing in Jackson questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since Jackson as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief. (Id. at 485-486; Emphasis added.).

In Crane v. Commonwealth, supra, the Kentucky Supreme Court followed the plain language of Lego in upholding Kentucky's adherence to the "orthodox" rule. Id., at 754. Logically flowing from that rule is the fact that once the trial court determines that the confession has been given voluntarily, it

may limit the addition of other irrelevant evidence on the same subject. Far from requiring that the circumstances of a confession must be presented to the jury, Lego merely affirms that Jackson did not limit or alter the evidence available to the jury under the law of the various jurisdictions. The Kentucky Supreme Court followed this interpretation in deciding Crane v. Commonwealth, supra.

In Kentucky, the control of the amount of evidence produced on any one point is clearly within the discretion of the trial court, Woods v. Commonwealth, Ky., 305 S.W.2d 935, 937 (1957), whether at trial as in Woods or prior to trial. Freeman v. Commonwealth, Ky., 425 S.W.2d 575 (1968). In addition, it is recognized that the trial court may properly limit the scope and extent of cross-examination if circumstances require. Hatton v. Commonwealth, Ky., 444 S.W.2d 731 (1969). These principles are so universal that no citation to federal or other authority is deemed important. Unless this Court is prepared to overthrow the "orthodox" rule, such decisions as were made in this case will always be necessary. In addition, as Crane v. Commonwealth, supra at 755, points out, there are significant dangers to any other approach. Petitioner's rights were fully protected by Kentucky Rule of Criminal Procedure 9.78 and by the ruling of the trial court, as affirmed by the Kentucky Supreme Court.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MAJOR CRANE — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

CERTIFICATE OF SERVICE

I, John S. Gillig, counsel for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of October, 1985, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari by depositing in the U.S. Mail, postage prepaid, a copy of same to Honorable J. David Niehaus, Deputy Appellate Defender, 200 Civic Plaza, 719 West Jefferson Street, Louisville, Kentucky 40202, Counsel for Petitioner.

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No. 85-5238

In the Supreme Court of the United States

OCTOBER TERM, 1985

MAJOR CRANE, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

JOINT APPENDIX

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CERTIORARI GRANTED DECEMBER 9, 1985

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 19, 1982—Jefferson District Court, Juvenile Session waives jurisdiction over petitioner's case and enters order transferring jurisdiction to the Jefferson Circuit Court.

October 13, 1982—Petitioner was indicted by the Jefferson County Grand Jury.

March 24, 1983—Petitioner filed a motion to suppress his statement to police officers.

October 31, 1983—Suppression Hearing Conducted in the Jefferson Circuit Court.

November 2, 1983—Findings of Fact and Conclusions of Law filed by the Jefferson Circuit Court.

November 29—December 1, 1983—Petitioner was tried by a jury in the Jefferson Circuit Court and convicted of wanton murder. The jury recommended a sentence of forty (40) years imprisonment.

December 8, 1983—Petitioner filed a motion for a new trial and a memorandum in support thereof.

December 12, 1983—Petitioner's Motion for a New Trial is overruled.

January 5, 1984—The Jefferson Circuit Court entered its final judgment sentencing petitioner to forty (40) years imprisonment.

February 28, 1985—Kentucky Supreme Court rendered its opinion affirming petitioner's conviction.

June 13, 1985—Kentucky Supreme Court entered an order denying the petition for rehearing filed by petitioner.

August 12, 1985—Petition for a Writ of Certiorari is filed in this Court.

December 9, 1985—The Petition for a Writ of Certiorari is granted.

[SUPPRESSION HEARING TESTIMONY OF DET. DONALD BURBRINK, SUPPRESSION HEARING TRANSCRIPT, PP. 6-26]

MR. STENGEL: The Commonwealth would call Detective Donald Burbrink.

The witness, DONALD BURBRINK, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STENGEL:

* * * *

Q1 Sir, for the record, would you state your name, please.

A Detective Donald Burbrink, Louisville Division of Police, Fourth District.

Q2 Sir, in your own words, would you tell the Court how you first came in contact with the Defendant here, Major Crane, on 8/14/81.

A Yes sir, on 8/14/81, we were in the Fourth District Office. We received a phone call from Officer Whitaker from the First District. He advised us that he had picked up a young white male who was from out at Boys' Haven, I think out there on Bardstown Road. I am not sure that it is Boys' Haven but it is out on Bardstown Road, a youth home.

The boy said he had been with a couple of black guys down in the westend, that he had run away from home and had run into a boy by the name of Major Crane, and that day had been down in the westend and broke into a service station. He asked me if any service stations had been broken into the night before. At that time, I said there was one, a body shop up on 28th Street that was broken into.

He said he was getting off and he would send somebody down with this boy to point out the service station.

Officer Herbst came down with the boy and rode around and he showed us the service station that was broke into was the Park and Gulf Station located at 2714 Duminil. He advised us that it was him and Major Crane. They took some batteries, etc. At that time, we went back to the district and he saw Major. He said there is Major Crane right there. This was around Southern and Catalpa. So he picked Major up. It was about 1752 hours and took him to the Fourth District Substation. At that time, Sergeant Cummings sent a car up to the Park and Gulf Station to obtain a report because there was none at that time available.

As they were in the process of getting the report, I went ahead and started typing up an arrest slip. We took Major back to the Fourth District Substation and he was given his rights orally at approximately 1801 hours and he was also offered a written rights form about 1805 hours.

Q3 Did you give those to him, sir?

A Yes sir, I did.

Q4 Did you take any special precautions in giving him the rights or would you tell the Court exactly what you did there.

A First of all, I advised him of his rights orally. I said, you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer prior to any questioning or making of any statements and to have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed by the court to represent you before any questioning, if you so desire. I asked him if he understood his rights and did he want to talk. He just said yeah, I know, I have been through this before. At that time, I wrote up a rights form and handed it to him and it sat there on the desk. I don't recall; I don't have it. It was in the juvenile thing as evidence and I don't have it back.

Q5 It was submitted in Juvenile Court as evidence down there?

A Yes, it was. So I don't recall if he signed it or not. At that time, I asked him for his mother's phone number and I called the number, which was 776-4364 and wrote down the time as being 1806. At that time, he was charged with Burglary, Third Degree. I talked to an aunt and told her of the Burglary, Third Degree charges and told her that we would have him up in the Dentention Center within an hour and she could call up there and at that time, they would advise her if they were going to keep him or send him back home to them of what time the court appearance would be. She said she would contact his mother and they would come up to the Detention Center within an hour.

At that time, as I was sitting there typing the arrest slip on him, Major was sitting in some chairs right there at the end of the desk. And just out of the clear blue sky, he said, "I confess." He said, "I confess". I said, "Confess to what?" He said, "I confess to robbing the hardware store out there on Dixie Highway next to Convenient." I kind of just looked at him and I really didn't pay him too much mind. He said, "I confess to shooting that police officer." He said, "I shot that police officer out there." He said, "I think I shot him in the face." I said, "what are you talking about?" He said, "Out there off Dixie Highway, I shot that police officer." He said, "Right before that, we robbed them people over at the bowling alley." I said, "Over at Big A?" He said, "Yeah, at Big A." And I was familiar with the county cases at that time that they were working on.

Q6 Excuse me, a point of clarification for the benefit of the Court here. The shooting of this cop is another shooting and has nothing to do with this case, is that right?

A That is correct. At that time, I told Sergeant Cummings to go out and tell Detective Highland to call County Robbery and have them meet us down at the

Youth Bureau, our Youth Bureau in City Headquarters, that they may have a lead on a couple of robberies they had been working on.

Q7 Okay, those were in the county?

A Yes, they were. So at 1825, we left the District with the arrest slip and took him to the Youth Bureau. On the way down, I again told him, you know your rights. He said, "Yeah, I know, I know what they are." So as we were riding on down, I asked him a little bit more about who was with you on the robberies because we knew there were some othe rsubjects. He knew one subject being Juan Downs. He said the other guy's name is Gregory. He said, "I don't know what Gregory's last name is." He said, "He has got a brother that is in the Youth Camp named Kevin who shot somebody." He said, "Gregory also shot a guy and put him in a wheelchair." So I knew who he was talking about. I knew it was Gregory Powell was one of the subjects he was talking about.

Then we asked him about any other thing he had done and if he knew anything about any of the other places around that had been robbed, and about the Keg Liquors. He said, "No, I don't know anything about that. I've never even heard of that." So we arrived at the Youth Bureau about 1838. So we left the Youth Bureau, by the time we got done with the paperwork, at 1859.

Q8 Could you explain what is done there at the Youth Bureau, why you have to stop?

A According to our policies and procedures, all the records, etc. for a juvenile is kept in one central location, which is the Youth Bureau. So in order to keep the records updated, you have to take them down there where they take pictures and fingerprints and add them to their file. That is where all the case files are kept for the juveniles.

Q9 Okay, and you arrived there when?

A We arrived there at 1838. Major asked me if he could have a coke, so we went and bought him a coke

and went down to the basement there and bought him a coke and some chips and took him up to the Youth Bureau. At that time, they went through their paperwork which is pulling his file, typing up another slip that has to be given at the Detention Center. We left there and went to the Detention Center and arrived there about 1908 and walked in. There is a long counter there. At that time, the people who were in charge, we handed them the paper and they searched Major. And at that time, we asked if we could have a booth in order to talk to him. And they arranged for us to have a room off of one of the corridors there in order to talk to Major.

Before we went back, I called his mother. Again, that was at 1912 and there was no answer at home. And the only thing I could assume is that they were on their way up there because the aunt said she would get the mother and come up to the Detention Center at the time. We called again at 1945 hours with no answer. We went in and took a taped statement from Major in regards to the Keg Liquors robbery and murder.

Q10 When was the first time he said anything about, other than the earlier denial in the car, when was the first time he said anything about knowing anything about Keg Liquors?

A When we were in the Detention Center.

Q11 And do you have the time on that?

A No, I don't have the exact time when it was. It was going through his statement that he gave which started at 1950 hours.

Q12 Fifty or fifteen?

A Fifty.

Q13 And had there been any discussion before the actual statement?

A What he said down at the District and what he said along the way down to the Youth Bureau was talked about in the car—who he was with, etc., but as far as the Keg Liquors, no, there was none until we were sitting up the tape in the room there. He was talking about the

robbery at Brown's Hardware. He said, "The guy hit a buzzer and an alarm went off and I shot up in the air." At that time, I said, "Well, there was nobody shot at Brown Hardware." He said, "No, I am talking about Keg Liquors." He said, "That is where I am talking about is at Keg Liquors where that guy got killed." At that time, we went back and started the tape and went over his rights again. Detective Branham was the one who mainly did the questioning on the tape.

Q14 How many attempts did you make to contact Major's family? Will this reflect also what Detective Highland did?

A I made 10 attempts to contact his family.

Q15 And those ran from when to when?

A When we first picked him up at 1806, we called then, called when we first got to the Detention Center, called before the statement started, called immediately after the statement and kept calling from there on until I finally talked to his grandmother and advised her of the—well, I talked to a cousin at one point and she wouldn't let anybody else get on the phone. I don't know who she was. I wanted to advise them of the charges that were going to be placed against him. She wouldn't let anybody else get on the phone. So I didn't want to advise her. I didn't know how old she was. So I kept calling and finally talked to the grandmother and we told the grandmother of the charges that were placed against him at that time.

Q16 By that time, when you talked to the grandmother, that's after you had added the Murder charges?

A Murder and all the Robberies, yes sir.

MR. STENGEL: Would you answer Mr. Jewell's questions, please.

CROSS EXAMINATION

BY MR. JEWELL:

Q1 Okay, Detective, the first contact the police had with Major Crane was at approximately 1801, correct?

A We picked him up at about 1752 hours. Now as far as talking—is that what you are talking about, or as far as when we picked him up?

Q2 The first contact. Now you are saying 1752?

A I said that earlier, yes.

Q3 That is what—5:52 p.m.?

A Yes sir. That is when we picked him up on the street.

Q4 And then you had him at the Fourth District until 1825, correct.

A Yes sir. We arrived at the Fourth District about 1800 hours. We had him there approximately 25 minutes.

Q5 And that put it at 6:25 p.m.

A Yes sir.

Q6 And then you went to the Youth Bureau and you finally got to the Detention Center and the Youth Center at 1908, correct?

A Yes sir.

Q7 7:08 p.m., correct?

A Yes sir.

Q8 Now the Youth Bureau that you referred to that you went to directly from the substation, that is in City Police Headquarters, correct?

A Yes sir.

Q9 And by the Youth Center, we are referring to a separate building over here at 8th and Jefferson, correct?

A Yes sir.

Q10 Now you do not have with you any signed waiver of rights taken at the substation or the Youth Bureau, correct?

A There was none offered to him at the Youth Bureau. At the substation, there was one. It was submitted when the Juvenile Court hearing was done downstairs.

Q11 Are you sure that was signed?

A As I said, I don't remember if it was signed or not. I offered it to him. It sat there. I picked it up as we left. I don't recall. It has been over a year since we even had the hearing. So I can't recall if it was signed or not. I don't have it here with me. It is not available to me.

Q12 You got a waiver signed at the Youth Center, correct?

A One of the county waivers, yes sir.

Q13 Do you have that waiver with you?

A I've got a Xerox copy of it.

Q14 And that waiver was signed at 1945, correct?

A As far as it reads here, yes sir.

Q15 That would be 9:45 p.m., is that correct?

THE COURT: 7:45.

A 7:45.

Q16 7:45, rather. Now when you went to the Youth Center, you took him into a room to question him, correct?

A Yes sir.

Q17 And who all was in that room?

A It is hard to say at one time. There was myself and Major Crane, Detective Branham, Detective Milburn were in there, I think constantly. Milburn may have left once or twice during that time. Myself and Detective Branham were always in there. Detective Highland came and went in order to take care of some other business. Sergeant Cummings was there and came and went.

Q18 Would that be all the people then—five police officers and Major Crane?

A Not at one time, no sir.

Q19 But I mean off and on that evening?

A Yes sir.

Q20 That would have been the sole people who would have been in there that evening?

A To the best of my recollection, yes sir.

Q21 Detective, you stated earlier that Major told you about shooting a police officer on Dixie Highway. This statement actually referred to a shooting incident on Kennedy Avenue, correct?

A That is off Dixie Highway, yes sir.

Q22 And in that incident, it was later discovered that Greg Powell was the one who did the shooting, correct?

A I don't believe that was ever found out for sure.

Q23 Mr. Carney was the victim, correct?

A Yes, it was.

Q24 And were you present in court both downstairs or upstairs when he identified Greg Powell as being the one who shot him?

A No, I wasn't.

Q25 Are you aware that Greg Powell has been convicted of that charge?

A I know he pled guilty to that charge, yes sir.

Q26 And you also stated that the first reference to Keg Liquors was when Major stated to the effect that a man pressed a buzzer and he shot in the air, correct?

A Shot up in the air towards him, yes sir.

Q27 And you are aware, are you not, that Keg Liquors had no buzzers or alarms at that time?

A I am not aware as to my own knowledge. No, I was told that but I don't know.

Q28 And were you told that by people at the Liquor Store?

A No sir.

Q29 Who were you told that by, sir?

A Detective Branham.

Q30 And he was one of the officers investigating that case for the county, correct?

A Yes sir.

Q31 When was the first time then that you informed Major's family that he was being either questioned or held on murder charges?

A They were advised at 1806 that he was being arrested on Burglary, Third Degree charges. From then on out, we could not raise anyone or talk to anyone. We left a note at the front desk when we were questioning him if his mother or aunt should come in, to appraise us of the situation and we'd come out and advise them

what we were questioning on. The next time I contacted someone, it was a cousin at 2100 hours. I did not know her age and was not going to tell her anything. She would not put an adult on the phone; at 2115 hours, I talked to the grandmother, or someone who said she was Major's grandmother and advised her.

Q32 What time was that now?

A 2115 hours and advised her of the charges being placed against Major.

Q33 That would be 9:15, correct?

A Yes sir.

Q34 Now the statement that you took at the Detention Center, the recorded statement, was started at 1950, correct?

A Yes sir.

Q35 And it ended at 2040, correct?

A Yes sir.

Q36 It would be 7:50 and 8:40 p.m., correct?

A Yes sir.

Q37 At any time during that interval, was Major himself allowed to use the telephone?

A No sir, he never asked.

Q38 Between your arrival at the Detention Center when you went to the room to interrogate Major and when you finally brought him out, did he talk to anybody except police officers?

A Not to my knowledge.

Q39 Do the statements at the District, in the car on the way to the Youth Bureau, in the tape recorded statement at the Detention Center, constitute all the statements in this case?

A From Major?

Q40 Yes.

A I don't know if it got back on tape. There was a statement he made in the bathroom. After we had got done, he wanted to go to the restroom and myself and Detective Highland took him to the restroom. He told us that he did not use a 357 at the Keg Liquors, that it was a 32 is what he shot the man with.

Q41 That is not included on the tape, correct?

A I do not know. I didn't get a chance to read it. I know that in Detective Branham's letter, I believe it is—

Q42 I am asking you about the tape, Detective, not a letter.

A I don't know. Do you want me to look through the tape and read it and see if it is.

Q43 Please do.

A No, it wasn't on the tape as far as I could tell.

Q44 On the tape, he stated that the weapon involved was a 357 magnum, correct?

A That is what he stated, yes.

Q45 And that was not the weapon involved, correct?

A It was a 32.

Q46 On the tape, he stated he took some money from the liquor store, correct?

A That is what he said on the tape, yes sir.

Q47 Did subsequent investigation reveal that amount of money taken from the liquor store?

A I wouldn't know.

Q48 Are you aware from talking with Detective Branham?

A I wouldn't know.

Q49 On the tape, did Major give you a time of day that this happened at Keg Liquors?

A It was at night. I don't know that he said exactly, what exact time it was.

Q50 I refer you then to a statement, I believe it is about the 12th page of the tape recorded statement. Yes, it is page 12.

A Go ahead.

Q51 About three fourths of the way down the page, does it not reflect that Major Crane in response to Detective Milburn who asked, "Do you know about what time it was during the day?" He states, "It was about five, about four or five o'clock."

A I see that.

Q52 And on down, do you see where it states, Major stating: "It wasn't dark yet. It was going—it was about an hour, no, it was a little while later and it would have been geting dark." Do you see that?

A I see it.

Q53 And are you aware of the time the Keg Liquor Store incident actually occurred?

A No, I am not.

Q54 Now this incident at Keg Liquor Store was being investigated by the county, correct?

A Keg Liquors, yes sir, it is in the county.

Q55 And you would not have had all the details of that offense when you first started talking to Major, correct?

A We had talked to them about it. I had enough grasp of the information that I knew—I didn't know the exact times, etc.

Q56 You didn't know the time it occurred nor if any money was taken, correct?

A No, I did not know. I just know what they told me.

Q57 What time was it when you turned Major Crane over to the workers at the Youth Center?

A As soon as the statement was done, after he went to the restroom to go to the bathroom, we turned him back over to them.

Q58 Did you put in your notes what time that was?

A I assume it was about 2045 hours because I called Judge Fitzgerald at that time to ask him about something which pertained to the case and at that time, he called you and you called me back and told me, "Don't talk to him anymore."

Q59 So that would be about 2045, correct.

A That is about what time.

Q60 That is what you are saying, correct?

A That is about what time I am saying. I called Judge Fitzgerald at that time. I think they had him at that time because I was out using the phone. So I don't know exactly what time it was they gave him to them.

MR. JEWELL: I have no further questions.

REDIRECT EXAMINATION

BY MR. STENGEL:

Q1 Sir, you just said you turned him back over. When you reported in there, you actually gave him to them?

A Gave them the paperwork and they searched him which is their procedure. At that time, we asked them for a booth and they gave it to us and we put him back in there.

Q2 You were more or less in a visiting room or what kind of room?

A Well, it was off the—as you walk in, there is a counter there where the intake who take over the people stand and then there is a hallway as you go off to the left to go to the restrooms and they've got a coke machine and a chip machine, etc. there. It was a room off of that, off a corridor.

Q3 The way I have it figured, there is one hour and 16 minutes from the time you picked him up until the time the taped statement was made. That includes the Fourth District Substation and a stop at the Youth Bureau for their paperwork and directly to the—what is the place called?

A The Detention Center.

Q4 Were there any extra delays, special delays or purposeful delays anywhere along there?

A The only delay was when he asked for a coke and a bag of chips. We had to go down to the—it is in the basement of police headquarters. We park down there and it is right next to the elevators. We stopped in there. For ever how long it takes to get a coke out of the machine and some chips out of the machine, that was the only delay that I could think of.

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[EXCERPTS FROM SUPPRESSION HEARING TESTIMONY OF DET. WAYNE BRANHAM, SUPPRESSION HEARING TRANSCRIPT, PP. 30-31]

* * * *

Q13 Now Detective, you had been investigating the Keg Liquor Store robbery and murder, had you not?

A That is correct, yes sir.

Q14 I have a couple of questions I want to ask you about that. Approximately what time of day did that incident occur?

A Approximately 10:40 p.m.

Q15 At night?

A Yes sir.

Q16 And was there $300 to $400 taken from that liquor store?

A No sir.

Q17 Was there any money taken that you could determine?

A No sir, not according to the owner of the store, there wasn't any money taken.

Q18 And was there any alarms or buzzers in that liquor store?

A No sir. There is a camera, simulated camera that is in that store but apparently it wasn't working. It is a fake camera is what it is.

Q19 What I am asking, is there any alarms, anything that would have sounded—had sirens going off or anything inside the store?

A No sir.

Q20 Do you remember in the statement Major Crane talking about how he panicked when he heard the alarm —correct?

A I don't have a copy of the statement. I do recall him mentioning something about sirens.

Q21 About how long did this statement take?

A I don't recall exactly how long, probably 30 or 40 minutes. I am not sure.

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[EXCERPTS FROM SUPPRESSION HEARING TESTIMONY OF MAJOR CRANE, SUPPRESSION HEARING TRANSCRIPT, PP 46-52]

* * * *

DIRECT EXAMINATION

BY MR. JEWELL:

Q1 State your name for the record, please.
A Major Crane.
Q2 Where were you born, Major?
A Right here in Louisville.
Q3 When were you born?
A 1965.
Q4 Do you remember back to August of 1981 when you got picked up by the police?
A Yes sir.
Q5 You were picked up down around Catalpa, correct?
A Yes sir.
Q6 Where did you go from there?
A I went to the Fourth District.
Q7 And what did you do there?
A We went in there and they—we was sitting—first, they took the handcuffs off me and the dude, me and the white dude that was in there. They took me back to the room and we sit there and they was telling me about my Burglary charge and about what I was charged with, about Burglary and things.

After they told me about my Burglary charges, they took the white dude out of the room and then he was asking me about some Robbery charges when we was down there. He was asking me about Robbery charges, you know, and about some more different things about my charges, about what I got now.

Q8 Did you volunteer this information to him or did he ask you?
A He asked me.

Q9 And then what happened?
A We was sitting there and he was asking me about some different robbery charges that had occurred behind the—I'm not for sure where it was. It was just some different robbery charges that he said had occurred in different places.
Q10 Who is the "he" you are referring to?
A The police officer that came in there first, Officer Bur-
Q11 Burbrink?
A Yes, that's him.
Q12 Continue, please.
A Then after he got finished asking me about it, some more police officers came in and they was all talking. He was still talking to me and things, still asking me about what I had did and things like that and I kept telling him that I didn't rob nobody. I hadn't robbed nobody and he was talking about the man—then he brought it up about the man that had got shot out on—I think it is off Dixie Highway, talking about the man that got shot off Dixie Highway. He kept talking to me about that. He was just saying about what they was going to do to me if I didn't sign some—they had some papers there that they wanted me to sign. They was talking about what they was going to do to me if I didn't sign some things.
Q13 Was this at the substation?
A This is at the substation, Fourth District.
Q14 Did you later leave the substation?
A Yes.
Q15 And where did you go from there?
A I want over to—right over across the street to Police Headquarters, to the Youth Bureau in that little room.
Q16 And what happened there?
A We went—after we went up, he asked me, he said as we was on our way up from the basement of the place, he asked me, said do you want something to drink or something to eat? I told him, I said yeah. So he got

something; he got me a Coke and a bag of chips. And he took me upstairs and he said well, we are going to have to sit and wait for two more police officers to come in from the county or somewhere. So we sat there and waited. And they came in and they was telling me—they took my fingerprints and stuff over there, I think, and took pictures of me. And then they said, well we are going to take him over to the Youth Center and interrogate him. They took me over to the Youth Center. After they took me over there, I got searched. I think I got searched and everything and I went in and I went on back to that little interrogation room. They was telling me what I was going to say on the tape recorder and if I didn't say it, what they was going to do to me, you know.

Q17 Why don't you describe this room for me that you went to over there?

A Just a little small interrogation room. It could hold about five or six people or more.

Q18 Was there anybody else in there with you but police officers?

A That is all that was in there was police officers.

Q19 And was this room where you could see the other workers at the Center, the social workers there?

A No, it was just a little closed room; it is a little bitty room, something like a closet. It is bigger and it is closed up. There ain't no windows or nothing, you know. It is just bricks around you.

Q20 And who was talking to you then?

A Officer Burbrink and the other officer that was sitting there. I can't think of his name. There was another one that talked to me. There was three of them that talked to me then. I think there was about six of them in the room at the time, when they was questioning me.

Q21 And do you remember signing a waiver of rights form?

A That is what I—that is the piece of paper that I was telling you about where they was telling me if I

didn't sign, what they was going to do to me. The piece of paper, they was talking about if I didn't sign it, they was going to put me on the tape recorder and stuff.

Q22 And why did you sign this piece of paper?

A Because I was scared. I didn't want them to be beating on me.

Q23 Why did you think they would be beating on you?

A Because they had said what they was going to do.

Q24 What did they say?

A They was talking about if you didn't sign the papers, we are going to knock your head off and all of this. We are going to do this to you, you know. So I went ahead and signed the papers like they said.

Q25 Did you want to talk to the police officers that night?

A No, I didn't want to talk to them.

Q26 What did you want to do?

A I wanted to go ahead where they could take me on down to the Youth Center where they could call my mother to see would she come and pick me up.

Q27 Did you ever ask to call your mother?

A Yes, when I first got to the Fourth District, I asked to call my mother.

Q28 Did you call her?

A No.

Q29 What did they say when you asked to call her?

A He told me, said you are not—exactly what he said, he said you are not calling nobody until we get finished with you over here.

Q30 And did you ever request to call your mother again at the Youth Center?

A When we got over to the Youth Bureau, I asked could I call and they told me I couldn't call over there.

Q31 When you signed this piece of paper, did you realize what you were doing? What did you think you were doing when you signed this?

A My mind was not functioning at the time. I wasn't thinking, you know. They just told me to sign the paper. I signed it because they was threatening me. It didn't make me no difference what was on the paper because I wasn't thinking. I was just scared.

* * * *

JEFFERSON CIRCUIT COURT
FIRST DIVISION

No. 82CR1544

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs

MAJOR CRANE, DEFENDANT

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The defendant came before this Court, pursuant to RCr 9.78, on the 31st day of October 1983, and challenged the admissibility of oral and tape recorded statements and alleged violations of the defendant's Constitutional rights as well as technical violations of KRS 208.110 and KRS 208.192. After hearing testimony from both the Commonwealth and the defendant's witnesses, including the defendant himself, this Court finds:

1. There was no sweating or coercion of the defendant.
2. There was no overreaching by the officers of the Louisville Police Department or the Jefferson County Police Department.
3. There was no delay in taking the defendant to the Youth Detention Center.
4. The credibility of the witnesses in a comparison of the defendant and the various police officers lies entirely with the police.
5. The defendant's academic achievement may very well be at a fourth or fifth grade level, but he has had

numerous experiences with the law and showed himself to be "street wise" in his testimony and it is the belief of this Court that he fully understood his rights to counsel and against self-incrimination.

ORDER

In light of the above findings, it is the order of this Court that the defendant's Motion to Exclude his Statements is hereby OVERRULED.

/s/ Joseph H. Eckert
JOSEPH ECKERT
Judge

Date 11-2-83

**[EXCERPTS FROM TRIAL TRANSCRIPT
(TE VOL. I, PP. 15-22)
OPENING STATEMENT OF DEFENSE COUNSEL]**

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MS. BAILEY: Judge Eckert, Mr. Stengel, ladies and gentlemen of the jury. You will be presented with evidence of a very serious and a very important case. It is a case where an 18-year-old boy, Major Crane, is charged with murder. The evidence, we believe will show two very different accounts of what happened at Keg Liquors on the night of August 7, 1981. The first account is a statement which Major Crane gave to the police, seven days after the shooting at Keg Liquors. In that statement, he related what happened at Keg Liquors that night. So you might be asking yourself, well, then why are we here today? Why are we having a jury trial? Why doesn't he just plead guilty? There is one answer to that question, ladies and gentlemen, and that is, Major Crane is not guilty of this offense.

The story that he told the police is just that, a story. There are inconsistencies throughout that story—things that just don't match up with what we know for certain happened that night. We believe that that contrast is enough to create a reasonable doubt in each one of your minds as to Major Crane's guilt.

The very circumstances surrounding the giving of the statement are enough to cast a doubt on its credibility. Major Crane was taken to the Detention Center, the Juvenile Detention Center, for questioning on the night of August 14th by Detective Burbrink. The evidence will show that he was brought there at 7:20 that night and that he wasn't turned over to the custody of the Detention Center until 9:00 p.m. He was taken to a room away from the staff of the Detention Center by the police. He was behind closed doors with the officers for an hour and 40 minutes. The only people present in that room were

the officers, five officers and Major Crane, a 16-year-old boy.

At this time, I would like to outline for you some of the inconsistencies which we believe the evidence will show between what Major told the police that night and what actually happened seven days earlier. He began the statement with just a narrative of what happened. The police just let him talk. He portrayed what could probably be termed as a pretty ordinary holdup of the store. He said that he met up with his Uncle George that day, that his Uncle George told him that he was out of a job and Major was carrying a 357 on him. His uncle went into the liquor store and a few minutes later, Major walked in and said, "This is a holdup." About that time, he heard sirens going off. The clerk had touched the alarm button in the store. Sirens went off; buzzers sounded. Major shot up in the air, grabbed some money and ran out of the store. And he says that his uncle, George Williams, grabbed some money and followed him. And that is the end of the story.

Now the police know when they heard this that this isn't any different than any other child's version of a holdup. So they asked for details. They started asking him questions. They asked him, Major, why don't you describe the store for us. So he says, well, there is a counter and there is wire fencing around that counter, and he tells the police where the soda pop is located in the store and where the potato chips are located, but he also tells the police he has been in the store several times before with his grandparents.

So they say, well, Major, where did this money come from that you said you took. You said you took $300 or $400. Where did you get it? Major goes into pretty much detail as to how the clerk reached up under the cash register and there was a drawer there, pulled it out, and that is where the big bills were kept.

But ladies and gentlemen, the evidence will show that no money was taken from the cash register. The police

checked the tape right after the shooting and no money had been taken. The cash register hadn't been tampered with. The police asked him, well, what was on the counter? What did you see on the counter? Major said a liquor bottle. Now ladies and gentlemen, what would you expect to find in a liquor store on the counter? And he also didn't mention that there was 11 cans of Stroh beer on that counter or that there was a brown paper bag. What time of day did this happen, he was asked. He said about four or five in the afternoon. It was still light out. It hadn't gotten dark yet. Ladies and gentlemen, the evidence will show the shooting took place at 10:40 p.m. that night. It had to have been dark by that time. Then it got down to the crucial question. What kind of gun did you use, Major? A 357 just like I told you earlier. A 357—are you sure it was a 357? They tried their best to get him to say it was a 32, but it wasn't. It was a 357. I know the difference between guns. My uncle has guns and I've seen guns and I used a 357.

There was only one factually correct response that Major gave to the police that night and that was that a shot was fired in Keg Liquors. So how is the Commonwealth going to prove to you its case of murder beyond a reasonable doubt? They don't have any scientific evidence. They looked for fingerprints. They took fingerprints out of the store. None of those matched Major's. They found a footprint outside the store in some sand. There was no return on that as to that being Major's footprint either. They found some tire tracks and they made pictures of those. Those don't appear to be linked to anything that had to do with Major. And they searched for the gun. They searched for that 32 and they couldn't find it. So what is the Commonwealth going to do? All it has is this confession, this confession of all the inconsistencies. What is going to bolster its weak case but even weaker evidence and that is the testimony of the uncle, George Williams.

Ladies and gentlemen, as Mr. Stengel told you, when Mr. Williams was first picked up, first questioned about this incident, he said he didn't know anything about it; I don't know what you are talking about. It wasn't until after the police continued questioning him and after, according to George, he heard Major's statement that he then decided he better make a deal with the Commonwealth—I'd better protect myself. And that is what he did. Why shouldn't you believe his testimony? Why should you question the credibility of Mr. Williams? First of all, he is a convicted felon. Not just because he pleaded guilty of murder and robbery in this case, but because he has quite a string of prior convictions.

Secondly, he got such a sweet deal from the Commonwealth pleading guilty to murder and robbery in exchange for testimony against Major Crane. In reality, he is not going to have to serve one extra day in prison for his guilty plea to those two charges—serious charges. Ladies and gentlemen, there is just not one scientific fact to link Major Crane to the incident at Keg Liquors. There is not going to be one witness that is going to take this witness stand and tell you, yes, I saw Major Crane at Keg Liquors, except for George Williams, who made such a good deal with the Commonwealth. So what is the results of this case? We believe that you will find that the result is the police took the easy way out. They got a confession from a sixteen-year old kid and they are going to rely on that confession, even though there are inconsistencies and discrepancies all throughout.

The Commonwealth Attorney, they realized this isn't a very good case. This confession is not going to be enough, not to convince a jury beyond a reasonable doubt that this boy is guilty of murder. They made a deal and that is the evidence you are going to hear today. That is the evidence that you are going to have to base your verdict and we believe that after you hear all of this evidence, you are only going to be able to return one verdict and that is a verdict of not guilty.

[EXCERPTS FROM TRIAL TRANSCRIPT
(TE VOL. II, PP. 3-8)
PROSECUTOR'S MOTION IN LIMINE]

* * * *

(Bench discussion before jury enters courtroom:)

MR. STENGEL: Yesterday, in the opening statement, the defense indicated that their basic tact is going to be, once again, to attack the voluntariness of the confession and coercion. I think that was a judicial or a legal matter which has been ruled upon by the Court and is not something which is tried before a jury.

THE COURT: That is correct.

MR. STENGEL: I would move to have motion in limine to block the defense from bringing out testimony along those lines. In the alternative, if they do bring that out, I would want to be able to go into the background of this boy to show what his sophistication is, etc., to show that he was not in any way—

THE COURT: Let us see if we can cut through this without getting into a lot of side roads or side issues. The determination made by the Court, Mr. Jewell will recall, was that the statements made were not coerced, were not violative of any constitutional rights and therefore, the issue of whether that was voluntarily given is not up for grabs. I believe that is the status of the law. Now does the defense intend to attack again?

MS. BAILEY: I wasn't arguing voluntariness.

THE COURT: I kept waiting for Commonwealth to object during your opening statement.

MS. BAILEY: I specifically stated right before I went into that, that the surrounding circumstances casted doubt on its validity and its credibility. I didn't say it casted any doubt on its voluntariness.

THE COURT: Well, part of your opening argument was to paint the picture of a 16 or 17-year old young lad held for an hour or close to two hours only by himself, etc., etc. The Commonwealth did not object but the ruling

of the Court is you may not attack the voluntary giving of that statement.

Now you may bring in any inconsistencies which you feel exist, but the voluntary nature of the statement and its admissibility—that has already been ruled upon.

MS. BAILEY: I know that, Your Honor.

MR. JEWELL: Can we develop in front of the jury the length of time which he was held during the giving of this statement?

THE COURT: No.

MR. JEWELL: Can we indicate to the jury the fact that he was alone with the police officers?

THE COURT: No.

MR. JEWELL: The Court is ruling all questions along those lines inadmissible?

THE COURT: Mr. Jewell, if you have law to the contrary, as an officer of the Court, you are under an obligation to disclose that to the Court at this point in time. I do not intend to be scurried on my own rulings; if defense counsel has law to the contrary, if you point out to me that that be error, now is the time to address it.

MR. JEWELL: Your Honor, I don't have a case on point at this time. I believe that that would go to the validity of the confession, not just to the voluntariness that should be addressed to the jury. I will be happy to look the law over at lunch for the Court.

THE COURT: Well, to that point in time, Mr. Jewell, and subject to the Court's reading such law as you present, the ruling of the Court is that it had previously ruled that the confession and the admissions or whatever they are were not violative of any of his rights and therefore could be admitted. Inconsistencies in those statements, of course, may be pointed out to the jury. But we are not going to again try the issue before this jury as to voluntary giving of this statement. Okay?

MR. JEWELL: I understand that ruling. I was asking the Court so I don't object to the cross examination

of those specific questions which I feel will go to the credibility of the voluntariness of it.

THE COURT: Well, as to credibility and inconsistencies, I think you may go into that. As to the reasons which you say, they seem to the Court to smack of voluntary giving or the nature of the statements being given voluntarily and that is beyond pale at this point in time.

MR. JEWELL: So specifically, I cannot ask about the length of time or the fact that he has been alone with the police officers?

THE COURT: Correct. Until you provide to the Court some law or ruling that indicates that you may attack again the admission of the statement, that is the ruling of the Court.

MR. JEWELL: I will ask the Court to be allowed to call the officers involved in this statement, to be given an opportunity to ask those questions by way of avowal outside the presence of the jury.

THE COURT: Oh, boy, okay, fine. You, of course, have that right.

MR. STENGEL: If you could give us maybe two seconds to be sure we have these things properly X'ed out and Branham understands on that statement.

OFF THE RECORD.

(Jury re-enters courtroom)

THE COURT: The record will reflect that the jury reconvened at the hour appointed by the Court. Ladies and gentlemen, you will recall yesterday that you were chosen as the 13 jurors in this case after a rather extensive voir dire examination. You then heard an opening statement given to you by the Court and you heard opening arguments given to you by counsel. We are now moving into that phase of the case where you will hear the evidence offered by the Commonwealth. They have now called their first witness.

MR. JEWELL: Your Honor, may we approach the bench.

THE COURT: Yes sir.

(Bench discussion:)

MR. JEWELL: I just need to note for the record our continuing objection to the statement coming in. I believe I have to renew the objection, even though I moved to suppress it in order to properly preserve it.

THE COURT: The objection is noted and the objection is overruled.

(Conclusion of bench discussion)

[EXCERPTS FROM TRIAL TESTIMONY OF DETECTIVE WAYNE BRANHAM (TE VOL. II, PP. 13-40)]

* * * *

DIRECT EXAMINATION

* * * *

A At 6:15 in the afternoon, I received information from Sergeant Cummings of the Louisville Police Department that he had arrested a male subject and he felt the subject had information in regards to this offense.

Q20 Who are we talking about here?

A We are talking about Major Crane.

Q21 That arrest had been made before you were involved in the case?

A That is correct, yes sir.

Q22 All right, sir, then did you talk to Major Crane any time that day?

A Yes sir, I did.

Q23 And when was that, please?

A That was on 8/14/181 and it was at approximately 7:50 at the Youth Center on West Jefferson Street.

Q24 Okay, sir, and could you tell us what happened as a result of that?

A Okay, after we advised Mr. Crane of his rights, we made a taped statement with him there at the Youth Center.

Q25 Has that taped statement been reduced to writing?

A Yes sir, it has.

Q26 Do you have a copy of it?

A Yes sir, I do.

Q27 Could we go through that, please.

A Okay, you want me to just read it—is that correct, sir?

Q28 Yes sir.

A Okay, this is me speaking and setting up the tape. I say: "Okay, today's date is 8/14/81. The time now is 2050 hours; present at 720 West Jefferson."

Q29 For the jury, that is 8:50, correct?

A Yes sir. ". . . present at 720 West Jefferson, Juvenile Detention Center, Detective Wayne Branham speaking. Detective Burbrink and Detective Highland with the Louisville Police Department; Detective Ron Milburn with the Jefferson County Police Department and also present was Sergeant Jay Cummings with the Louisville Police Department. We are here to interview a Major Crane who gives a date of birth of 5/16/65, and an address of 1312 South 26th Street. Okay, Major, before we start, I am going to give you your rights again, okay? You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer prior to any questioning and making of any statements and to have him present with you while you are being questioned. If you cannot afford a lawyer, one will be appointed by the court to represent you before any questioning, if you desire. You may stop questioning or making of any statement at any time by refusing to answer further or by requesting to consult with an attorney prior to continuing with the questioning or the making of any statement. Do you understand all that, Major?" Mr. Crane replies: "Yes, sir."

Q30 Continue now.

A Okay, then I ask: "Okay, we are going to talk about an incident that happened at Keg Liquors on Cane Run Road. You just sit and tell us what happened over there, okay?" Mr. Crane replies: "Uh-huh. I know that it was just an old man—not old, not really old, but a middle-aged man that ran the liquor store and we had been watching him because one day, me and Adrian Hardy—you all know Adrian Hardy, don't you? We was over there in the Big A Shopping Center. Somebody ran out and they had robbed somebody over in the Big A—got

robbed and this policeman ran out and his gun—this fat policeman ran out and his gun got stuck on him and he couldn't shoot and a man pulled off in a black Thunderbird and me and little A. D. followed him. We followed the man in the black T-bird all the way down to Carter Hall where that liquor store is in Irving. He got out of his car and took off running. We thought maybe he was going to leave the keys or the sack of money in the car because the police was after him. Then I said, 'I am going home; I am going home and get the gun.' I told little A. D. that I was going home to get the gun. I didn't tell him what I was going to do. So I went and got the gun. I got the sawed-off and had it and I had the 357 on me while I was walking. Then I saw—I ran into George. Well, that was the same, the day after or the day before, after he had lost his job and he told me about—and he said he was down for some money. I said okay and he said I'll play it off. He walked in and he made like he was buying something. What he was buying, I don't know. Then I ran in there and I told them, "This is a holdup." I told him it is a holdup and then the man—the feet looked like, it was a button or something and his feet touched on the floor and then the sirens and stuff started going off and I shot up in the air. I shot the gun up in the air. I ran out and George was still standing there. And then I think he ran out—he ran on out. After I got some money—I didn't get much. It was about--I got about $300 or $400 out of there and I ran on out and George had already got some money. George was in there getting some money and then he ran out. He walked out—he didn't run. He ran out out, walked on back down Carter . . ."

Q31 Excuse me. I think you misread that. Could you start there . . . "George was in there . . ."

A "George was in there getting some money and then he ran out. He walked out; he didn't run. He walked on out, walked on back down Carter Homes and I met up with him later that night and he said, 'Yeah, I got a bank

roll now.' And I said, 'Yeah, I do too.' I saw George again and then he was still walking around. I asked him where the sawed-off shotgun was and he said, 'I got it put up.' He said, 'Walter got it.' I said, 'Well, here since he got that one, let's let him keep this 357, too.' And now my uncle, Walter Whitaker, is the one that's got the 357 put up in his house." And then Detective Burbrink asked, "Who is George?"

Mr. Crane replies: "The one that just got fired off his job." Detective Burbrink: "And what is his full name?" Mr. Crane: "George Williams, Howard Williams."

And I asked, "Where does he live?" Mr. Crane replies: "Right down there at Carter Homes." Then I asked, "Do you know the address?" Mr. Crane replies: "Huh-huh, I don't know exactly where it is." Is he the one that got locked up for robbing some dude up on Hazel and Duminil?" Mr. Crane replies: "Yeah." Detective Burbrink: "Same George Williams?" Mr. Crane: "Uh-huh."

And then I asked, "This liquor store you are talking about, do you remember what night it was?" Mr. Crane: "Huh-huh." I asked: "How many nights ago was it?" Mr. Crane replied: "I don't really remember what day it was or when it was. It ain't been no real long time since I did."

I asked Mr. Crane to try to describe the store, the liquor store that he was talking about. Mr. Crane replied, "The counter is right there. This is where I left out about that lady getting in that little car. The door is right there in the front and the man standing behind the counter. Some kind of—I don't know what the stuff is. It is like fencing. It is agoin all the way around the thing, you know." "Is it called chicken wire?"

Mr. Crane replies: "Yeah, that's—yeah, they have blocked off now with that stuff and a little opening. Bread thing is sitting right here. It is going straight across like that with potato chips and I think it is canned pop and pops in bottles. Their warm pop and there is a refrigerator sitting there behind the thing where they keep cold pops, cold beer and stuff." Detective Milburn

asked: "Where is it located at?" Mr. Crane replies: "Out there across from Algonquin Shopping Center." Detective Burbrink states: "Is it right there at the light?" Mr. Crane replies: "Yes." Burbrink: "Right across from the Big A Shopping Center? As you come out, it is right across the street?" Mr. Crane replies: "You can come out through that thing from Big A Shopping Center and go straight on across when the light turns. There is a light sitting right there. It is a filling station. There is a big old field and then there is a Bonded Filling Station way down about a block." Detective Burbrink: "When did you find out what happened to the man?" Mr. Crane: "When I read in the paper, when I kept on asking about the newspaper name, my mother was getting upset about it." Detective Burbrink: "What did you find out?" What happened to him?" Mr. Crane replied: "I heard that he got shot but I was hearing that he got shot but I really didn't know until I looked in the newspaper and I saw it and then I just said well, that is just the way I said it—it is just another person, just dead." Detective Burbrink: "Major, did you fire the round off in there before or after you got the money?" Major Crane answered: "After, after I got the money and then he—when I saw his feet move." Milburn asked: "Where did the money come from?" Mr. Crane replied: "Behind the counter." Detective Milburn asked: "Did you get it from behind the counter?" Mr. Crane replied: "He gave it to me." "Did you observe where you got it from? Was it maybe out of a cash register, a safe or . . ." Mr. Crane replies: "It was out of the cash register and it is a little box up under the cash register where you pull the drawer out. You could pull the drawer out like and then I think that is where he keeps most of the large amount of money until they come and pick it up." Detective Milburn: "Do you remember anything about this clerk that was in there? Was it a white man, black man?" Crane replied: "He was a white man." "Remember anything—how he was dressed?" "Huh-huh, I never really pay no attention

to how people is dressed." Burbrink: "Do you remember what he looked like—what color hair he had, if he had a mustache, blond or anything?" "No."

Q32 Beard or anything.

A "Beard or anything." Mr. Crane replied: "No, but he did have hair on his face. Yeah, he did have some hair on his face." Burbrink: "Remember if—kind of long hair or short hair or what color his hair was?" Crane: "It wasn't very long; it wasn't real long but it was—he had normal-size hair." Burbrink: "Was it as long as mine or longer?" Crane: "About like his right there." "Like Highland's?" "Uh-huh, like that." Burbrink: "Was it about the same color of his or was it my color or . . ." Crane replies. "It was a gold-like color. His hair was—I think he used some kind of—I don't know what color it was." Milburn: "Did you put the money in a bag or anything or did he put it in a bag or did you just carry it out?" Crane: "I had a bag; I already had my bag. I had a brown paper sack stuck down in there. I stuck the money in and went on out, went on down to Carter Homes." Burbrink: "Did you notice anything on the counter, like maybe someone had just bought something that was in a bag?" Crane replies: "A half-pint of liquor, that is what it was." "What kind was it?" "It was a half-pint of liquor. I still can't remember what kind it was. It was a half-pint." Burbrink: "George was there at the counter too when you robbed?" Crane replied: "He was at the counter. He was standing like this and the man was standing behind him but I told him, I told him. When I tell him, he got the money and I pulled my brown sack out and put it in the bag and went on out. George was still in there getting money after I had shot him. I didn't know I had shot him and George climbed through that little window and went in there and went behind there with him." I asked, "What little window did he climb through?" Crane replies: "I don't really know. It is a window where they have to give you stuff out of, like get packages and bags, where they have to hand

it out because they just can't hand it to you like in a grocery store or something. You've got to stick it through the thing and stick your money through there." Burbrink asked, "Would you remember the half pint if you heard it, what kind it was—was it?" And then I say, "Do you remember what kind it was? You said you thought you could or something a minute ago?" Crane replies: "I think it was Old Forester, I am not real sure." Milburn asked, "Would you recognize the label on it if you saw some of them—different types of liquor?" Crane replies: "I might would then." Then I asked, "Let's get back to the clerk for just a minute. Do you remember any type of clothing he had on, Major?" Major replied, "Huh-huh." Then I asked, "What color shirt he had on or anything? What did he say to you when you went in?" Crane: "He didn't say anything. He wasn't saying nothing. He was quiet. The man didn't say anything at all. Didn't nobody say anything to me." Then I asked, "And what did you say?" Crane replies: "That is when I told him to hold up, this was a holdup. Then I told him that this is a holdup and when I walked in there and when the lady was sitting in her car, when I told him that, he wasn't saying nothing. He didn't say nothing to me." Then I asked, "Was there anyone in there except you and George at the time?" Crane replies: "That lady, she got in her car. She had bought her stuff and was getting in her car. She pulled off. There wasn't nobody. I didn't see nobody else." I asked, "Do you remember what kind of car she got in?" Crane replies: "Huh-huh, I coudn't remember that." I asked, "Black lady? White lady?" Crane replies: "White lady." And then I asked again, "It was a white lady?" Mr. Crane replies: "No, I am getting confused." I asked "Okay, just take your time." Milburn asked, "Do you want to take a drink—want a drink?" Crane replies: "Thank you. I just wanted to know, is they going to lock me up down there?" And I asked, "Are you going to what?" Crane replies: "Lock me up today." Then Milburn replies: "Major, in reference to the liquor store, any particular reason why you went

to that liquor store?" Crane replies: "Because he was the only person in there." Milburn: "Had you been there before?" Crane replies: "A few times with my grandfather and my grandmother. They will buy something out of there." Milburn asked: "Have you been there that day other than when you went in there to rob it?" Crane replied: "I had watched; I had watched over there for awhile to see who goes in and out but you know, as far as going in there buying stuff, I don't really go in there." Milburn asked, "Do you remember what time it was during the day?" Crane replies, "It was about five, about four or five." Milburn: "In the morning?" Crane replies: "Uh-huh." Milburn: "Or afternoon?" Crane replies: "Afternoon." I asked, "Was it dark or light?" Crane replied: "It wasn't dark yet. It was going—it was about an hour—about a little while later, it would have been getting dark." I asked, "Go over again what kind of gun you had when you went in there." Crane replies: "I had a 357 when I went in there." I asked, "And what did George have?" Crane replied, "He didn't have nothing because I said—what I told you all, I said I didn't know whether he went and got the shotgun. I had it hid up under him or what." I asked, "So as far as you know, George didn't have anything." Crane replies: "Uh-huh." I asked, "Could he have had one?" Mr. Crane replied: "But I know he had money. I know he got some money out of there too." Burbrink asked, "Did you plan this beforehand with George, you and him talk about this before you went in?" Mr. Crane replied, "We talked about it." Burbrink asked, "What did you all say?" Crane replied: "How we could do it, the way we could do it." Burbrink asked, "So you and George discussed it. Did you go to George with this?" Crane replies: "I went to him, yes." Burbrink asked, "He agreed with you?" And Mr. Crane replied, "Yeah." Milburn: "So as far as you remember or as well as you remember, the clerk never said anything to you?" Crane replied: "Huh-huh." I asked then, "This gun that you are talking about that

you had there at the liquor store, where is it now?" Mr. Crane replied, "Over at Walter Whitaker's house." Then I asked, "Okay, do you know where Walter lives?" Mr. Crane replies: "Yeah." I asked, "What is his address?" Mr. Crane replied: "2906 Duminil." I then asked, "Do you know where it is at in the house?" Mr. Crane replied, "Yeah, I could take you right to it if I could go but I doubt if I could go." Branham, "Well, just tell me as best you can. Explain where it is at in Walter's house." Mr. Crane: "It is in his bedroom in his closet. The bedroom is—the bathroom is right there and his bedroom is right there next to the bathroom."

Branham, "Where does he live? Does he live there by himself?" Crane replies: "Uh-huh, with his three kids and his girlfriend." Burbrink asked, "Is it in the closet in the back of the closet or up in the closet?" Mr. Crane replied, "Up in the closet." Burbrink asked, "Is it hidden?" Crane replies: "Uh-huh, under some pocketbooks, my grandmother's old pocketbooks and stuff." I asked, "Is it chrome, is it blue or . . ." Mr. Crane: "Is it a nickel plated, it is just a nickel-plated 38 or something." Then I asked, "Are you sure it is a 357?" Mr. Crane replied, "I am positive." Then I asked, "Do you know your guns pretty good?" Mr. Crane replies: "Yeah, I could name any kind of gun if I look at it." And I asked, "Are you sure this is a 357?" Mr. Crane replied, "Yeah, I am positive." Then I asked, "How were you holding the gun? You said you shot in the air over there." Mr. Crane replies: "I shot like this because I couldn't shoot it like this. I started to shoot it like this but it jacks my arm back. So I shot it like this, straight up in the air." I then asked, "Where did you get the gun?" Mr. Crane replied, "That is the one I got out of the truck." Then I asked, "Okay, we are talking about the same one from earlier?" Mr. Crane replied: "Uh-huh."

Then I asked, "How did Walter come by the gun?" Mr. Crane replied, "Because George let him keep it that day when he got locked up. They took him down there to

Walter." Mr. Burbrink asked, "Walter got any other guns up there as far as you know?" Mr. Crane replied, "He has got knives." Burbrink: "What about the sawed-off, is that up in there?" Mr. Crane replied, "Yeah, that is in the closet too. It is setting in the closet where you put the shoes back in the closet, just setting up." I asked, "How many guns have you had in your possession say in the last three months?" Mr. Crane replied, "Three." I asked, "What kind were they?" Mr. Crane replied, "A 38.. a 357 Magnum and a sawed-off shotgun, double barrel."

Milburn asked, "Where did you get the sawed-off at?" Crane replies: "Where did I get the sawed-off? The sawed-off ain't mine; that is George's. George, he goes out and steals and he gets guns and he brings them over to my mother's and sells them to them or even to my aunt. My aunt has got guns that he done sold to them." Then I asked, "Well, has Walter been with you or anything? He is just holding the guns?" Crane replies: "He is just probably—he just keeps them for George but he ain't going to steal nothing from nobody—not Walter." Burbrink asked, "How old is Walter?" Mr. Crane replied, "Walter is 25; he just turned 25 years old." Burbrink: "Walter did?" Mr. Crane replies: "Yeah." Burbrink, "Do you know if he has ever been locked up?" Mr. Crane replied: "He has been locked up for terroristic threatening for Milton Harris."

• • • •

CROSS EXAMINATION

BY MR. JEWELL:

Q1 Detective Branham, at the time of the offense at Keg Liquor Store, would you estimate that at approximately 10:30 to 10:40?

A That is correct, yes sir.

Q2 So it would be in the p.m.?

A Yes sir.

Q3 That would be 10:30 to 10:40 at night?

A That is correct, yes.

Q4 And you determined also that the 32 caliber weapon had fired the bullet that struck Randall Todd, correct?

A That is correct, yes.

• • • •

Q16 Now by way of your investigation, you were able to determine that no money had been taken from the cash register, correct?

A That is correct.

Q17 And no money had been taken from a safe or a box or anything like that?

A Not as far as we could determine; no money at all was taken.

• • • •

Q34 Now in your investigation of this, did you determine whether or not this store had an alarm which would sound a siren or buzzer?

A It doesn't have an alarm, no sir.

• • • •

Q56 Detective, in the statement which you've just read, Major Crane said he shot up in the air, correct?

A Yes sir.

Q57 He says he shot up in the air because of the alarm and the sirens that went off, correct?

A Correct.

Q58 It was determined that there is no alarm in that store that would make a siren go off, right?

A Sir, the only alarm system in there was a fake camera and it was on the ceiling.

Q59 There is nothing in there that could cause a buzzer or an alarm to go off?

A No sir, not to my knowledge.

Q60 Major Crane said the man gave him $300 or $400, correct?

A Yes sir.

Q61 And he got it under the cash register, correct?

A Yes sir, he did.

Q62 And as far as you all could determine, no money was taken from the cash register, correct?

A That is correct.

Q63 In fact, the printout on the cash register read a little over, didn't it? The money in the cash register was a little over the printout, correct?

A I believe that is correct.

MR. JEWELL: I have no further questions.

REDIRECT EXAMINATION

BY MR. STENGEL:

Q1 Sir, referring to the tape recorded statement of Major Crane, page seven, the counter we are talking about there, if I was standing behind that counter and you were standing where a customer would stand, you would be unable to see my feet, is that correct?

A Yes sir.

Q2 Down about two inches up from the bottom of the page, right after Major says: "I told them this is a holdup", have you found that?

A Yes sir.

Q4 He then says, "I told him it is a holdup and then the man—his feet looked like it was a button or some-

thing that his feet touched on the floor." Is that correct? That is what he said?

A Yes sir.

Q5 And then he said, "Then sirens and stuff started going off." In fact, it would have been impossible for him to see the feet or a button on the floor.

A Yes sir, it would be impossible.

* * * *

[BENCH CONFERENCE: OBJECTIONS BY DEFENSE COUNSEL TRIAL TRANSCRIPT (TE VOL. II, PP. 43-44]

* * * *

(Bench discussion:)

MR. JEWELL: The Commonwealth—its next witness is Officer Burbrink. Again, we'll have to—well, we need to enter an objection to the Court's ruling that we can't ask about the time or the number of police officers present during the statement. We have not been able to find a case. However, in Palmore's instructions to the jury, there is an admonition in there that the jury must believe the voluntariness of the confession which would seem to allow this in. Also, we feel it would go to the credibility of the confession and not just the voluntariness.

THE COURT: This is noted for the record and your objection is overruled.

MR. STENGEL: I didn't know which way you were going to go and I told him to be prepared to go into the voluntariness. I have to tell him to clam it on that.

MR. JEWELL: Also, we need to ask Detective Burbrink to remain available after his testimony for the avowal. I'll have to do that outside the presence of the jury.

(Conclusion of bench discussion)

[AVOWAL EVIDENCE PRESENTED BY DEFENSE COUNSEL (TE VOL. V, PP. 14-25) TESTIMONY OF DET. WAYNE BRANHAM AND TESTIMONY OF DET. DONALD BURBRINK]

* * * *

MR. JEWELL: At this time, we would like to put on our avowal evidence, Judge, which we reserved at trial, that being Detective Branham.

THE COURT: Please take the stand, Detective.

MR. JEWELL: And we'd also have Detective Burbrink. I'll not ask that he be separated since this is going in by avowal.

THE COURT: Detective, you remain under the same oath as was previously administered to you. This evidence is offered into the record by way of an avowal, it having been ruled by the Court that it is not appropriate to have it brought before the jury.

AVOWAL TESTIMONY OF DETECTIVE WAYNE BRANHAM

BY MR. JEWELL:

Q1 Again, state your name.

A Detective Wayne Branham.

Q2 Detective Branham, you were involved in the taking of the statement from the Defendant, Major Crane, were you not?

A Yes sir.

Q3 On August 14th, did you receive a call from the City Police to meet them somewhere in reference to Major Crane?

A Yes sir, I did.

Q4 About what time was this?

A I believe it was about 6:50. I didn't bring my report up with me.

Q5 And where did you meet the city police at?

A I first met the city police at the Louisville Police Department Youth Bureau and I proceeded over to the Youth Center.

Q6 Did you talk with the Defendant, Major Crane, at the Youth Bureau?

A No.

Q7 Did you talk to him at the Detention Center?

A Yes sir, I did.

Q8 Did you arrive there at approximately 7:00 o'clock?

A That would probably have been about the correct time, yes sir.

Q9 And you then began questioning or talking with Major Crane at that time?

A Yes sir.

Q10 Now you took a waiver of rights at 7:45, correct?

A Yes sir, I believe so.

Q11 And the recorded statement did not begin until 7:50, correct?

A That is correct.

Q12 When you were at the Youth Center with Major Crane, were any of the social workers at the Youth Center present with him during your questioning?

A During the questioning, no sir.

Q13 Was any member of his family present?

A No sir.

Q14 Was anybody present besides Major and the police officers?

A No sir, there was not.

Q15 The room in which you did this questioning at the Youth Center, about how big was it?

A It is a small office. I'll estimate it at maybe probably 10′ x 10′ maybe.

Q16 And you were present at the questioning?

A Yes sir.

Q17 And Detective Milburn?

A Yes sir.

Q18 Detective Burbrink?

A Yes sir.

Q19 Detective Highland?

A Yes sir.

Q20 And was there any other persons present?

A I believe Sergeant Cummings was in the room too, with the Louisville Police Department.

Q21 And while you all were in this office, did you have the door open or closed?

A Sir, I don't recall whether it was open.

Q22 Does this office have any windows in it?

A No sir.

Q23 And this is the office where you first started talking a little after seven until the statement ended at 8:40, correct?

A That is correct. That was our office that was given to us there by the workers at the Center.

Q24 No worker from the Center stayed in there for the questioning, correct?

A No sir.

Q25 Did you request that one stay in there?

A No sir.

Q26 At any time, did you see Major Crane use the phone to call a family member?

A No sir.

Q27 At any time, did you, yourself, talk to the mother of Major Crane that evening?

A That evening?

Q28 While questioning was going on.

A No sir.

Q29 Say prior to 8:40?

A No sir.

MR. JEWELL: I have no further questions.

EXAMINATION OF DETECTIVE BRANHAM ON AVOWAL BY MR. DAVID STENGEL

Q1 Sir, how was Major Crane being treated during the time you were there?

A He was treated well. I think at one point, we asked him if he wanted a drink. He was seated at a table, as I recall, or a desk-type table.

Q2 Did you get him any sort of soft drinks, potato chips, anything like that?

A I know he was asked. I don't remember whether he requested one. If he did, I am sure he got one but I don't remember.

Q3 Would you describe his demeanor at the time.

A His demeanor was he was calm at the time. It was just a conversation-type situation.

Q4 Were you all seated, standing? What was the scene in there? Did you all have enough chairs to go around?

A As I recall, I was seated and I believe there was a couple of more chairs. I don't remember the exact arrangements. There may have been one or two officers standing.

Q5 Had you had any discussion prior to the time you started tape recording that statement?

A With?

Q6 With Crane.

A I talked to him briefly before but we went right into the recording.

Q7 Were any threats, promises, or anything else made to him there at that time?

A No sir.

Q8 Are you aware of attempts to contact his family?

A I am not aware, no sir. The workers there at the Center may have been attempting to contact them. I don't know.

Q9 At one time, he requested that he go to the rest-room, is that correct?

A That is correct.

Q10 And did he go?

A Yes sir, he did.

Q11 In your presence, was he abused, threatened or anything else in any way?

A No sir, he was not.

MR. STENGEL: Thank you, sir.

MR. JEWELL: I have no further questions.

THE COURT: Thank you, you may stand down. Other avowal evidence?

MR. JEWELL: Detective Burbrink.

THE COURT: Detective, you remain under the same oath as was previously administered to you.

AVOWAL TESTIMONY OF DETECTIVE DON BURBRINK—EXAMINATION BY MR. JEWELL:

Q1 Please state your name for the record, please.

A Detective Donald Burbrink, Louisville Division of Police, Fourth District.

Q2 Detective Burbrink, what is the first time you came in contact with Major Crane on August 7th?

A Approximately 1752 hours, 5:52 in the afternoon.

Q3 5:52 p.m.?

A Yes sir.

Q4 And you all remained at the substation for awhile after that, did you not?

A We left the substation at 1825. So by the time we got into the district, it was about 1800 or six o'clock, 6:00 p.m. So we were there approximately 25 minutes or enough time for me to type up a slip.

Q5 And then you took him to the Youth Bureau which is in Louisville Police Headquarters, correct?

A Yes sir.

Q6 And how long did you remain there?

A According to my time, we arrived there at 1838 and we left there at 1859.

Q7 Then you proceeded to the Youth Center, correct?

A Yes sir.

Q8 Where upon arrival after you all went into the Youth Center, you all went to a room for questioning, correct?

A Correct.

Q9 And you had called the County to come meet you at the Youth Bureau, correct?

A Yes sir.

Q10 Now when you arrived at the Detention Center, the room that you went to, was it down a hall from the admissions area?

A There is a long desk there in the admission area. There is a doorway there. You come out the door; you go to your left and it is about 10 yards down the hall.

Q11 And this room—would you agree with the description we had of about 10′ x 10′ perhaps?

A 10′ x 10′, 12′ x 12′, something like that, yes sir.

Q12 And this room had no windows?

A That is correct.

Q13 And during questioning, I am talking about from this time until the tape recorded statement ended at 8:40, was anybody else allowed in? Did anybody else come into the room besides Major Crane and the police officers?

A No sir, Detective Highland went back and forth getting Major some soft drinks and potato chips, etc, but nobody else entered, no sir.

Q14 No worker, no family member, nobody else?

A No sir.

Q15 And you were aware at this time that Major Crane was 16 years old, correct?

A Yes sir.

MR. JEWELL: I have no further questions.

EXAMINATION BY MR. STENGEL:

Q1 Sir, did you make any attempts to contact Major Crane's family?

A Yes sir, I did, several times. When we first picked him on up and brought him to the Fourth District Substation, I tried to call the mother. I talked to an aunt at

that time and told her what was going on with his charges, etc., and where he could be found and she said she would contact the mother and bring her to the Detention Center. I told her about what the timing would be. I called back again at 1912 when we first arrived at the Detention Center and there was no answer at home. And at that time, I assumed the mother and aunt were on the way. We left specific instructions with the people at the front desk, if the mother of Major Crane or an aunt or any family member were to come in, to take them back to the room where we were questioning him.

I called again before the statement started at 1945 and again there was no answer. After the statement, we tried repeatedly to call and finally talking to his grandmother later on.

Q2 Do you have a list of the repeatedlies there?

A Yes. Seven attempts of calling from 2043 until 2128.

Q3 And you say Detective Highland was coming and going with soft drinks, etc. for Major?

A Yes.

Q4 Did Major express any sort of discomfort or fear or any other negative feelings while you all were talking to him?

A No sir.

Q5 Describe his demeanor and his—well, first, his demeanor.

A He was calm just like you or I sitting here, just matter of fact about everything.

Q6 Could he be described as talkative?

A Oh, he was definitely talkative.

Q7 You talked about a considerable amount of things other than simply this offense, isn't that correct?

A Yes sir, that is correct.

Q8 And that was freely given or apparently freely given from Major to you?

A Yes sir.

Q9 Do you remember any requests that Major made that weren't acted upon or weren't granted?

A None whatsoever.

Q10 Any requests to call home?

A No sir, never requested to call home or requested to call anybody.

MR. STENGEL: Okay, thank you, sir.

REEXAMINATION BY MR. JEWELL:

Q1 Detective Burbrink, when you talked to the aunt over the phone, did you tell her that Major was being questioned in regards to a murder charge?

A He was not being questioned about a murder charge at that time, sir; so we did not have any reason to tell her that.

Q2 So as far as you know, at least from yourself, the family did not learn that he was being questioned on a murder charge prior to the statement, correct?

A That is correct, yes sir.

MR. JEWELL: I have no further questions.

THE COURT: Will counsel for the Defendant state upon the record again the purpose of this avowal.

MR. JEWELL: The purpose of the avowal, Judge, was earlier today, the Commonwealth moved by motion in limine that we not be allowed to go into the facts and circumstances surrounding the confession, such as how long the young man was in police custody, the fact that he had nobody there with him, since they felt that was heard at the suppression hearing and should not be heard in open court. We then stated we felt we had a right to ask the police officers those specific questions as it went to both voluntariness and credibility to be given a confession by a 16-year old in police custody at least a couple of hours with no family member present. The Court sustained the Commonwealth's motion, overruling our objection. Therefore, we felt we had to get this evidence in by avowal.

THE COURT: Thank you. The way the Court interprets RCr 9.78, it is evidenced in the file by the way the

Court handled the matter at a previous hearing. The Court is reinforced in that handling or in its decision and determination to handle it pursuant to RCr 9.78 by what has now been placed in the record, which was a total rehash of that which was heard at the suppression hearing which is required and which was held. The Court would only state to counsel that the provisions of the rule, that is RCr 9.78 are mandatory and were so accepted by this Court when it had a suppression hearing.

The Court entered, as it required by the rule, its findings. The Court notes that in the rule itself it is stated: "The trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling.

If supported by substantial evidence, the factual findings of the trial court shall be conclusive." Since the time of the adoption of that rule, as it is presently worded, October 14, 1977, to be effective January 1, 1978, this rule has been treated most recently in the case of *Moore v. The Commonwealth*, wherein enigmatically, the appellate court held that while a hearing should have been conducted, the fact that it wasn't conducted when a motion was made on the day of trial was not prejudicial error. It sort of astounds this Court because I feel it is a fundamental right to have that hearing and I granted that hearing in this particular case.

In any event, if you wish to peruse that for some leisurely reading, it is at 634 SW 2nd 426 (1982 case). I am sure Mr. Jewell is familiar with it. I only cite that to the Commonwealth because of the burden of work that the Commonwealth has and it may have escaped their attention. Thank you, gentlemen.

I believe, also, the record should reflect that in addition to this latter point brought up at this time, the motion to suppress included further grounds of the infancy of the defendant, of his inability to comprehend the magnitude and the Court made a specific ruling on that point also.

JEFFERSON CIRCUIT COURT
DIVISION ONE

NOTICE-MOTION-ORDER

No. 82CR1544

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

MAJOR CRANE, DEFENDANT

NOTICE

TO: Hon. David Stengel
Assistant Commonwealth's Attorney

Please take notice that the following motion will be made in the coutroom of the above Court, on Monday, December 12, 1983, at 8:30 a.m.

MOTION FOR NEW TRIAL

Comes the defendant, by counsel, pursuant to RCr 10.02, and moves this Court for a new trial on the charge of murder in the aforementioned indictment. The defendant, by counsel, states that he was prevented from having a fair trial and that, in the interest of justice, a new trial is required for the following reasons:

1. The defendant, Major Crane, was found guilty of wanton murder on December 1, 1983, after a three day jury trial in which the jury recommended a 40 year sentence of imprisonment.

2. The principal evidence for the Commonwealth was a confession given by the defendant to the police on August 14, 1981, in which the defendant admitted to shooting a gun in Keg Liquor Store on August 7, 1981.

3. In opening statement, defense counsel informed the jury that it would be presented with evidence of the circumstances surrounding the giving of the confession to

the police by Major Crane. Prior to the presentation of proof, the prosecutor moved this Court *in limine* to prohibit the defense from cross-examining the police officers about the circumstances surrounding the taking of the confession or from introducing any evidence which had been used at the suppression hearing on the issue of the voluntariness of the confession. Defense counsel responded that she was not attempting to relitigate the issue of voluntariness before the jury but was placing this information before the jury for it to use in weighing the credibility and validity of the confession.

4. This Court ruled that RCr 9.78 was controlling and that since this Court had found the confession to have been voluntarily given and thus admissible at trial, then the defense was prohibited from informing the jury about the circumstances surrounding the obtaining of the confession.

5. The evidence of the circumstances surrounding the obtaining of the defendant's confession which was produced by avowal—including the number of hours the defendant was held in the custody of the police for questioning, the number of officers present at the interrogation, the place where the interrogation was held, and the absence of any family member or friend at the interrogation—is clearly significant information for a jury on the issue of the credibility of the confession and the weight which it should be given. Such was the conclusion reached by the United States Supreme Court in *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) (see accompanying memorandum for a fuller discussion).

6. This Court based its decision on RCr 9.78. As stated in the comment to that rule, however, the rule merely changes the procedural requirements of *Bradley v. Commonwealth*, Ky., 439 S.W.2d 61 (1969). No substantive rights of the defendant were affected by the adoption of the rule; thus Kentucky case law clearly permits the defense to introduce evidence of the conditions under which the confession was obtained, including the evidence

which the trial court considered in ruling on the admissibility of the confession. *Karl v. Commonwealth*, Ky., 288 S.W.2d 628 (1956), and *Johnson v. Commonwealth*, Ky., 302 S.W.2d 585 (1957).

7. Failure to premit evidence of the circumstances surrounding the taking of the confession has resulted in a reversal of a defendant's conviction with an order for a new trial. *Karl v. Commonwealth, supra*; *Lewis v. Alabama*, Ala.App., 329 So.2d 596, Aff'd 329 So.2d 599 (1975); and *Kagebein v. Arkansas*, 496 S.W.2d 435 (1973).

8. For the foregoing reasons and from the aforementioned caselaw and that contained in the accompanying memorandum, it is clear that the defendant was denied a fair trial when this Court ruled that the jury could not be presented with evidence of the circumstances under which the defendant's confession was obtained.

WHEREFORE, the defendant respectfully requests this Court to set aside the verdict of the jury and to grant him a new trial.

[Certificate of Service Omitted in Printing]

JEFFERSON CIRCUIT COURT
DIVISION ONE

No. 82CR1544

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

MAJOR CRANE, DEFENDANT

ORDER

Motion having been made and the Court being sufficiently advised.

IT IS HEREBY ORDERED that the defendant, Major Crane, be granted a new trial.

_____

Judge, Jefferson Circuit Court

DATE: _____

JEFFERSON CIRCUIT COURT
FIRST DIVISION

No. 82CR1544

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

MAJOR CRANE, DEFENDANT

MEMORANDUM IN SUPPORT OF MOTION FOR A NEW TRIAL

Prior to 1964, the issue of the voluntary nature of a defendant's confession was determined by one of three methods. The orthodox method required that the trial judge conclusively determine the issue of voluntariness and this was usually done outside of the hearing of the jury. The Massachusetts procedure dictated that the trial judge first determine whether the confession was voluntarily made and, if he found it to be voluntary, then the confession was submitted to the jury which reconsidered the issue of voluntariness. Under the New York rule, the judge made a preliminary determination of the voluntariness of the confession and excluded it only if under no circumstances could it be found to be voluntary; otherwise the jury determined not only the truthfulness of the confession but also whether it was given voluntarily.

In 1964, the U.S. Supreme Court decided the case of *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964), where it found the New York rule unconstitutional under the Due Process Clause of the Fourteenth Amendment. The Supreme Court held that under the New York rule, it could not be determined from the jury's verdict whether the jury had found the confession

to be voluntary and thus relied on it or whether it was found to be involuntary and ignored. Further, the Court had serious doubts as to whether a jury could separate the issue of voluntariness of a confession from the issue of its believability. The Court determined that the issue of voluntariness must first be determined by the court before the confession is submitted to the jury.

The issue before the Supreme Court in *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), concerned the burden of proof standard by which the prosecution must establish the voluntary nature of a confession. It was held that the trial court must find the confession to be voluntarily given by a preponderance of the evidence before submitting it to a jury. The Court also addressed the issue of whether the circumstances surrounding the taking of the confession was evidence for the jury by stating:

> Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulnes sof confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. *Id.*, 404 U.S. at 485-486, 92 S.Ct. at 625, 30 L.Ed.2d 618.

Thus the Supreme Court's opinion in *Lego v. Twomey*, *supra*, makes it clear that a trial court cannot constitutionally prohibit a defendant from introducing evidence of the circumstances surrounding the giving of a confession to a jury for its consideration as to the credibility of the confession as well as the weight it is to be given.

Kentucky courts have also addressed this issue. In 1956 the rule in Kentucky was that the court decided the question of whether the confession was voluntarily given, but the defense was free to introduce evidence of the sur-

rounding circumstances because of its direct bearing on the credibility and weight which the jury should attach to the confession. Thus in *Karl v. Commonwealth*, Ky., 288 S.W.2d 628 (1956), the court held:

> If the confession is held inadmissible, the accused has been protected since the jury has not heard the prejudicial evidence of an involuntary statement. If the statement is held competent and admissible, the statute will have fulfilled its purpose; that is. to protect the accused against introduction of a statement involuntarily obtained. The statute would have no further function or application. The confession, having been held competent and admissible, should then be introduced into evidence as any other statement, whether written or oral, and placed on the same basis as any other character of evidence insofar as its credibility is concerned. The defendant may then present to the jury evidence, in the nature of rebuttal, as to the conditions under which it was obtained, that he did not make the confession, or tending to contradict, discredit, or lessen the weight thereof. Either party then has a right to produce before the jury the same evidence which was submitted to the court when the court was called upon to decide the question of competency and admissibility and all other facts and circumstances relevant to the confession or affecting its weight or credit as evidence. This rule is in accord with the weight of authority. 20 Am.Jur., Evidence, Section 538, page 457; 22 C.J.S. Criminal Law, § 834, page 1458; Wigmore on Evidence (3rd Ed.), Volume 3, Section 861, pages 348-9. See Annotations, 170 A.L.R. 567. See also State v. Crank, 105 Utah 332, 142 P.2d 178, 170 A.L.R. 542 (*Id.* at 633).

At that time Kentucky was following the orthodox rule which was found in KRS 422.110, commonly known as the "Anti-Sweating Act". See also *Johnson v. Commonwealth*, Ky., 302 S.W.2d 585 (1957), where it was reiterated that once the confession is found to be voluntary by the court then the defense may introduce evidence attacking its credibility.

By 1969, Kentucky had adopted the Massachusetts procedure of having the trial judge first determine the admissibility of the confession and then resubmitting that issue to the jury for it to find voluntariness beyond a reasonable doubt. See *Bradley v. Commonwealth*, Ky., 439 S.W.2d 61 (1969). In 1978, RCr 9.78 went into effect; it reads:

> If at any time before a trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

The purpose of the rule is stated in the comment which follows it; the rule modifies the procedural requirements of *Bradley v. Commonwealth, supra*, by having the trial court solely make the determination of voluntariness and by eliminating the beyond a reasonable standard as recognized in *Lego v. Twomey, supra*. Thus RCr 9.78 places Kentucky once again under the orthodox rule as defined in *Karl v. Commonwealth, supra*.

Nothing in RCr 9.78 or in the comment to that rule takes away the defendant's right to present to the jury all evidence which has a bearing on the weight or credibility of his confession. RCr 9.78 merely changes the procedural requirements of *Bradley v. Commonwealth*,

supra, but does nothing to affect any substantive rights of the defendant.

Case law from other jurisdictions also establishes a defendant's right to present to the jury the same evidence which was presented at the suppression hearing because of its bearing on the credibility of the confession. In *Lewis v. Alabama*, Ala.App., 329 So.2d 596, Aff'd 329 So.2d 599 (1975), the court stated that it would follow the orthodox rule requiring the trial court to decide the issue of voluntariness conclusively. The court there cited Corpus Juris Secundum on the jury's function regarding the confession:

> In connection with, and for the purpose of making its determination as to, the weight and credibility of confessions, the jury, under proper instructions, may and should hear and consider evidence of circumstances as to the voluntary character of the confession. Thus, it has been held that if the confession was found by the court in the preliminary hearing to have been freely and voluntarily made and is admitted in evidence, the evidence given on the preliminary examination to determine its admissibility may or should be replaced before the jury to enable them to pass on the credibility of the confession. 23 C.J.S. Criminal Law § 843, p. 297.

The Alabama court reversed the defendant's conviction in *Lewis v. Alabama*, *supra*, for failing to admit evidence of the circumstances under which the confession was obtained because "[t]he jury in determining the weight and credibility of the confession was entitled to consider the predicative evidence." 329 So.2d at 598. The relevant Alabama statute is similar to Kentucky's RCr 9.78; Alabama Code § 43-2105 states in pertinent part:

> Issues of fact shall be tried by a jury, provided that the determination of fact concerning the admissibility of a confession shall be made by the court when the issue is raised by the defendant. . .

Similarly, in *Kagebein v. Arkansas*, 496 S.W.2d 435 (1973), the court interrupted defense counsel on cross-examination of the police officer who took the defendant's statement and told him he was prohibited from questioning the witness on the circumstances surrounding the confession. In reversing the defendant's conviction, the Supreme Court of Arkansas held:

> The purpose of our *Denno* hearing statute (Ark. Stats. 43-2105) is to prevent a jury from hearing a confession before the court determines that it has been voluntarily given. It is not intended to restrict evidence a jury may hear after a court determination of voluntariness has been made. The defendant still has the constitutional right to have his case heard on the merits by a jury, including the weight and credibility the jury might give to the voluntariness of the confession. *Id.*, at 440, citing *Lego v. Twomey*, *supra*.

The courts in *Iowa v. Holland*, 138 N.W.2d 86 (1965), *Calloway v. Florida*, 189 So.2d 617 (1966), and *Witt v. Commonwealth*, 215 Va. 670, 212 S.E.2d 293 (1975), n.1, likewise hold that submission to the jury of the circumstances surrounding the taking of the confession is not for the purpose of having the jury relitigate the issue of voluntariness "but as bearing upon the weight to be accorded [the confession] and the credibility of the witnesses who testified regarding the confession". *Iowa v. Holland*, *supra*, at 91.

Although no reported cases have been found in Kentucky on this issue since the adoption of RCr 9.78, it is clear from the Supreme Court decisions in *Jackson v. Denno* and *Lego v. Twomey*, both *supra*, that the trial court must initially decide the issue of voluntariness before permitting the jury to hear the defendant's confession; but once the confession is found to be freely given by a preponderance of the evidence then the defense has the right to produce that same evidence before

the jury for it to use in determining the weight and credibility to be given the confession. Both Kentucky case law prior to the effective date of RCr 9.78 and case law from other jurisdictions on this issue has held this to be the correct procedure and constitutionally required as a right belonging to the defendant.

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JEFFERSON CIRCUIT COURT
FIRST DIVISION

Indictment No. 82CR1544

CHARGE: MURDER

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

MAJOR CRANE, DEFENDANT

FINAL JUDGMENT
SENTENCE OF IMPRISONMENT

The defendant having entered a plea of not guilty and on the 1st day of December, 1983, a jury having returned a verdict that the defendant was guilty of the crime of MURDER and fixed his sentence at forty (40) years;

On this 5th day of January, 1984, the defendant, Major Crane, appeared in open Court with his attorney, Honorable Franklin P. Jewell, and the Court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment and the Court having provided the defendant, through his attorney, with a copy of the written report of the presentence investigation prepared by the Division of Probation and Parole, and the Court having given due consideration to the said written report of the presentence investigation prepared by the Division of Probation and

Parole and to the nature and circumstances of the crime and to the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary for the protection of the public because:

(a) there is substantial risk, that the defendant will commit another crime during any period of probation or conditional discharge.

(b) the defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institute.

(c) probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the defendant and it is therefore ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of the crime of MURDER and his sentence is hereby fixed at a maximum term of forty (40) years at hard labor in the State Penitentiary; and

IT IS FURTHER ORDERED AND ADJUDGED that the defendant is hereby credited with time spent in custody prior to the commencement of sentence; namely, 510 days, toward service of the maximum term of the imprisonment, or whatever time he has served on this charge only.

IT IS FURTHER ORDERED that the Sheriff of Jefferson County deliver the defendant to the custody of the Department of Corrections hereunder at such location within this state as the Department shall designate.

After imposing sentence, the Court informed the defendant that he has a right to appeal to the Supreme Court of Kentucky with the assistance of counsel; that if he were financially unable to afford an appeal, a record would be prepared for him at public expense and counsel would be appointed to represent him; that an appeal must be taken within ten days of the date of this judgment, and that the Clerk of the Court would prepare and file a notice of appeal in his behalf within that time if he so

requests. Pending appeal the defendant is remanded to the Corrections Department.

/s/ Joseph H. Eckert
JOSEPH H. ECKERT
Judge

January 5, 1984

SUPREME COURT OF KENTUCKY

No. 84-SC-407-MR

MAJOR CRANE, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

Rendered: February 28, 1985

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH ECKERT, JUDGE
No. 82-CR-1544

OPINION OF THE COURT BY JUSTICE GANT

AFFIRMING

Appellant was convicted of wanton murder of the clerk of a liquor store during a robbery, and sentenced to 40 years imprisonment. The single issue on this appeal concerns a confession by the appellant, and poses a question of first impression.

Prior to trial, appellant moved to suppress his confession pursuant to RCr 9.78, which reads:

> Rule 9.78. Confessions and searches—Suppression of evidence.—If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

The trial judge conducted a lengthy hearing and denied the motion to suppress, finding the confession to be voluntary. He made extensive findings of fact and conclusions of law covering the hearing and the contentions of the appellant that: There was no coercion or sweating; there was no overreaching by the interrogating officers; there was no inordinate or undue delay; the detention was normal and not under repressive circumstances; despite his youth, appellant had numerous exposures to the authorities and was "street wise"; and appellant was fully informed of and understood his rights.

At trial, appellant did not testify, but sought to introduce through the interrogating officers, before the jury, the same evidence of the circumstances surrounding the taking of the confession, which evidence was denied upon motion by the Commonwealth.

It is important to note the request of the appellant and the ruling of the court. By avowal testimony and argument to this court, appellant designates that his intention was to elicit such information as the length of time appellant was detained, the size of the room in which he was questioned, the number of officers present, the absence of a member of his family or a social worker, etc. The effect of the ruling of the trial court was that this evidence related solely to voluntariness and would not be admitted. However, the trial court specifically ruled that counsel for appellant could develop any evidence from any source, including the interrogating officers, relating to "credibility and inconsistencies." It is also noteworthy that appellant concedes that he was allowed to fully develop the "inconsistencies and mistakes of fact" in the

confession. However, he contends that, although under our law the jury is not permitted to pass upon the voluntariness issue, the circumstances under which the confession was given should be admitted in order to reflect upon credibility.

The roots of this case are firmly implanted in *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), and *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). These cases, in essence, provide that an accused must be permitted to attack the admissibility of evidence such as a confession or the fruits of a search before that evidence is introduced at trial. The several states are left to their own procedure as long as adequate safeguards are prescribed. Two general categories have evolved through the years which are approved by these two cases. One of these has been designated as the "orthodox" rule, under which Kentucky has cast its lot with the enactment of RCr 9.78. The orthodox rule provides that the trial judge *alone* shall determine the voluntariness of a confession or the admissibility of the fruits of a search.[1] The other rule is known as the Massachusetts or federal rule, under which the judge makes the original determination of voluntariness and, if the evidence is admitted, the circumstances of the confession (or consent to search) are placed in evidence with the advice that the jury may consider the evidence only if it finds that the confession or consent was voluntary.

Under the orthodox rule, a certain procedure has developed. The trial judge first conducts an evidentiary hearing on voluntariness, but is admonished by the United States Supreme Court that the judge cannot consider the reliability, credibility or authenticity of the confession in

[1] Cf. *Diehl v. Commonwealth*, Ky., 673 S.W.2d 711 (1984), in which this court held there was no error in excluding testimony before the jury concerning the voluntariness of a consent to search where the judge had ruled, upon substantial evidence, that the consent was voluntary. In this case we ruled that the findings of the judge were conclusive as to the issue raised.

determining its voluntariness. See *Lego v. Twomey*, *supra*, at 404 U.S. 484, 92 S. Ct. 624, Footnote 12. Then, in some cases, the jury is permitted to head the same evidence, usually without testimony of the defendant, but advised they cannot consider voluntariness but may consider only that evidence which relates to credibility. The Supreme Court acknowledges that these separations are difficult.

The history of these suppression hearings in Kentucky is likewise of importance. Following *Jackson v. Denno*, *supra*, this court decided the case of *Bradley v. Commonwealth*, Ky., 439 S.W. 2d 61 (1969). See also *Britt v. Commonwealth*, Ky., 512 S.W.2d 496 (1974). This court adopted RCr 9.78, effective January 1, 1978, subsequent to our decision in *Bradley*, *supra*, and clearly modifies the procedural requirements announced in that case.

It is the opinion of this court that there was no error in excluding from the jury the circumstances relating solely to voluntariness. As we said in *Diehl v. Commonwealth*, *supra*, the findings of the trial court were conclusive on that issue. In this case, appellant was permitted to show, upon examination of an interrogating officer, that the confession contained a misdescription of the weapon used in the homicide; that it spoke of a burglar alarm when there was none; that it told of taking money from a cash drawer when none was taken, and spoke of a gun being fired which had not been fired. Appellant was permitted to question the officer about suggesting material to the appellant during a break in the taping process. It is our further opinion that the excluded testimony related solely to voluntariness. It did not relate to the credibility of the confession, but to the credibility of the trial judge and his ruling on voluntariness, the latter being the function of the appellate court, not the jury.

The dangers inherent in admitting evidence before the jury concerning the circumstances attendant to taking the confession are obvious. We have previously spoken of the

difficulty in separation of those factors relating to voluntariness and those relating to credibility, and feel this separation is best vested in the hands of the trial judge and not in the minds of the jurors. Second, the issue of voluntariness is a settled issue, no longer debatable except on appeal. Third, the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with Miranda rights, etc. are excluded.

It is the holding of this court that, once a hearing is conducted pursuant to RCr 9.78 and a finding is made by the judge based upon substantial evidence that the confession was voluntary, that finding is conclusive and the trial court may exclude evidence relating to voluntariness from consideration by the jury when that evidence has little or no relationship to any other issue. This shall not preclude the defendant from introduction of any competent evidence relating to authenticity, reliability or credibility of the confession.

The judgment is affirmed.

All concur except Leibson, J., who dissents and files a dissenting opinion.

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SUPREME COURT OF KENTUCKY

84-SC-407-MR

MAJOR CRANE, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

Rendered: February 28, 1985

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. JOSEPH ECKERT, JUDGE
(Indictment No. 82-CR-1544)

DISSENTING OPINION BY JUSTICE LEIBSON

Respectfully, I dissent. There is no articulable distinction between evidence relative to voluntariness and evidence relevant to credibility. Evidence that a confession was coerced, of physical or psychological intimidation surrounding the taking of the confession, is relevant to its credibility. It bears on its truthfulness.

The fact that the trial judge has already considered the same evidence in making a decision whether to admit or exclude the confession makes no difference. Neither does the fact that under RCr 9.78 it is solely the function of the judge to decide whether to admit the confession.

The jury must still decide guilt. The same evidence that the judge heard in deciding to admit the confession

must now be heard a second time before the jury, because the evidence bears on the credibility of the confession, an essential consideration in deciding guilt. The judge's decision about coercion does not preempt the jury's need to consider evidence about coercion in deciding guilt.

The fundamental principle which we should apply has been summarized in Lawson, *Kentucky Evidence Law Handbook*, § 1.10(A) (2nd ed. 1984), as follows:

> "Multiple Purposes: Evidence that would be admissible if used by the jury for one purpose but inadmissible if used for another purpose should be admitted when offered for the proper purpose."

The trial judge's decision that the confession was not involuntary, or that he rejects the evidence of coercion, has no bearing on its subsequent use before the jury as relevant to the credibility of the confession.

RCr 9.78 was enacted to bring our procedure in compliance with United States Supreme Court decisions in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) and its progeny, which includes *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618, 1972).

Jackson in 1964 mandated a pretrial hearing procedure at which the trial judge must decide on the admissibility of a confession when challenged as involuntry. Only then will the jury be permitted to consider it. Following *Jackson* there was confusion as to whether *Jackson* eliminated any further need for the jury to consider voluntariness as a threshold before considering the confession. But this threshold question has no bearing on the relevance of such evidence to the credibility issue.

During the period while there was confusion about the meaning of *Jackson*, we adopted the *Bradley* rule. *Bradley v. Commonwealth*, Ky., 439 S.W.2d 61 (1969). This rule gave the accused a second bite at the threshold issue as whether the confession should be entirely disregarded.

We stated that even though the trial judge has decided the evidence was admissible:

> "[T]he trial court should admonish the jury not to consider the evidence unless it finds beyond a reasonable doubt that the defendant freely and voluntarily consented . . . ." 439 S.W.2d at 64.

The effect of RCr 9.78, effective January 1, 1978, is to eliminate the *Bradley* procedure, the jury's second bite at the suppression issue. But the 1978 change did not, and could not, restrict the admissibility of evidence regarding the circumstances surrounding the taking of a confession. Once the confession has been admitted into evidence, this evidence is relevant to the weight and credibility of that confession. Our holding to the contrary is not just a matter of misinterpreting RCr 9.78. It is a constitutionally impermissible interference with the accused's right to challenge the credibility of the evidence against him.

Lego v. Twomey, supra, serves to clarify the confusion which followed *Jackson v. Denno*. It explains that the rule in *Jackson* does not limit the defendant's right to present the same evidence which the judge has considered and rejected at the time he decided voluntariness when ruling on the admissibility of the confession. Such evidence may be offered *once more before the jury*, so that the jury may now weigh this same evidence in considering the credibility of the confession, even though the confession has been admitted into evidence. *Lego* states:

> "A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief." 404 U.S. at 485-86.

Lego explains the reason that such evidence is admissible a second time as follows:

> "Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence." 404 U.S. at 485.

Thus *Lego* explains that the United States Supreme Court's purpose in *Jackson* in requiring a preliminary suppression hearing was to keep confessions from coming before the jury, *whether true or false*, if involuntarily obtained. The jury must still consider whether the confession is true, and evidence of coercion bears directly on the question. The Supreme Court states that the *Jackson* "case was not aimed at reducing the possibility of convicting innocent men." *Lego, supra* at 485. As restated in the headnote to *Lego v. Twomey*:

> "4. The rule excluding coerced confessions from evidence does not preclude an accused, once his confession is admitted in evidence, from familiarizing the jury with the circumstances surrounding the confession, including facts bearing on its weight and voluntariness, and does not preclude the jury from disregarding a confession which is insufficiently corroborated or otherwise deemed unworthy of belief." 30 L.Ed.2d at 619-20.

The majority opines that there are two rules on this subject, an "orthodox" rule followed in Kentucky and a "Massachusetts or federal rule" which, presumably, is different. There may be room for two procedures; one where the trial judge alone decides on admissibility, and a second where after the trial judge decides to admit the confession, the jury is instructed to consider voluntariness a second time as a threshold before considering the confession. But either way the jury may still consider evidence of coercion as bearing on the weight to

be given a confession. The only difference is that in one case there would be no separate instruction to the jury to consider voluntariness as a threshold to be crossed before giving any consideration to the confession.

In *Hamilton v. Commonwealth*, Ky., 580 S.W.2d 208 (1979), we state:

> "The effect of RCr 9.78 is to obviate the procedural requirement of submitting the issue of voluntariness of a confession to a jury following the determination of that issue by the trial judge. . . . [I]t follows that there was no error in [the trial court's] failure to present the issue of voluntariness to the jury." 580 S.W.2d at 210.

This case says "to present the *issue* of voluntariness to the jury," but nothing about presenting evidence of coercion to the jury. It means only that there is no need to *instruct* the jury to consider voluntariness as a threshold issue before considering the confession. This has nothing to do with the duty to admit evidence bearing on the credibility of the confession, and coercion fits squarely under that heading.

State v. Urscanin, 266 N.W.2d 880 (Minn. 1978) illustrates the meaning of "the so-called 'orthodox rule,'" which Kentucky has adopted. It explains that the court's preliminary hearing considering voluntariness is conclusive as to "whether the confession is admissible." *Id.* But it further explains:

> "[I]f it is admissible, the court admits it *and evidence surrounding the making of the confession.* It does not invite the jury to deliberate on the issues relating to admissibility, but only on *those relating to weight and credibility.*" 266 N.W.2d at 881. (Emphasis added.)

We have gone an impermissible step further. We not only withdraw from the jury any further consideration of admissibility, but we also withdraw any further con-

sideration of "those [issues] relating to weight and credibility." *Id.*

There is an obvious distinction between the situation with regard to voluntariness of a confession and the situation with regard to consent to search. Whether the consent to search was voluntary or not is completely unrelated to the credibility of the evidence obtained in the search. Both situations are the same in that if the trial court finds that the confession was obtained as a result of coercion or the search conducted by coercion, the evidence should be suppressed. The difference is that effecting a search by coercion has no bearing on the credibility of the physical evidence obtained as a result of the search, but obtaining a confession by coercion has a direct bearing on the credibility of the confession. *Diehl v. Commonwealth*, Ky., 673 S.W.2d 711 (1984), cited in the majority opinion, is not dispositive of the issue before us. It is inapposite.

This case should be reversed and remanded with directions that, regardless of the trial judge's finding of fact as to the admissibility of the confession, the jury should be permitted to consider evidence of coercive circumstances surrounding its taking.

SUPREME COURT OF KENTUCKY

84-SC-407-MR

MAJOR CRANE, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
#82-CR-1544

HONORABLE JOSEPH ECKERT, JUDGE

ORDER DENYING PETITION FOR REHEARING

Appellant's petition for rehearing is denied.

All concur.

ENTERED June 13, 1985.

/s/ ROBERT F. STEPHENS
Chief Justice

SUPREME COURT OF KENTUCKY

No. 85-5238

MAJOR CRANE, PETITIONER

v.

KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 9, 1985

(4)

No. 85-5238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAJOR CRANE, *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, *Respondent.*

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In a criminal case, does a state trial court deny a defendant rights guaranteed to him by the Sixth and Fourteenth Amendments when it refuses to permit him to present to the jury the facts relating to the circumstances surrounding the procurement of his confession and the weight to be given them when those same facts have been considered and conclusively determined by the trial judge in his pre-trial determination of the admissibility of the confession?

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OPINIONS BELOW

The Supreme Court of Kentucky affirmed the petitioner's conviction in a published opinion on February 28, 1985. *Crane* v. *Commonwealth*, Ky., 690 S.W.2d 753 (1985). (Joint Appendix, J.A., 68-78).

No written opinion was rendered by the Circuit Court of Jefferson County, Kentucky. However, that court did make findings of fact and conclusions of law regarding the question presented herein. (J.A. 21-22; Suppression Hearing Transcript, hereafter Supp. TE, 73-76).

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1257(3) because, as reflected in the question presented, the petitioner submits that rights guaranteed to him by the Sixth and Fourteenth Amendments have been abrogated.

The Supreme Court of Kentucky affirmed the judgment of conviction on February 28, 1985 (J.A. 68-78) and denied a timely petition for rehearing, filed on behalf of the petitioner on June 13, 1985 (J.A. 79). On August 12, 1985, a timely Petition for a Writ of Certiorari was filed. Sup. Ct. R. 20.4. The Petition for a Writ of Certiorari was granted on December 9, 1985.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves a question of whether the denial of a criminal defendant's attempt to introduce evidence and pursue a line of cross-examination at trial is a denial of his due process right to put on a defense and his Sixth Amendment right to confront witnesses. At trial in this case, the petitioner sought to elicit evidence concerning the circumstances surrounding the taking of his confession "to cast a doubt on its credibility." (J.A. 23, Opening Statement of Defense Counsel). The trial in this case differed from most in that the evidence against the petitioner consisted primarily of his own confession to the police, a taped, out-of-court statement made by his co-defendant, and a taped out-of-court statement made by the petitioner's mother to the police. There was very little physical evidence concerning the crime and, as shown below, none of it directly implicated Major Crane as the perpetrator of the shooting that resulted in the death of Randall Todd. Therefore, the out-of-court statements, and particularly Crane's confession, were the only evidence that he was guilty of the crime charged. Much of the testimony presented at trial was an attempt to corroborate Crane's confession and show its correlation with facts known by the police through their independent investigation. Crane, of course, attempted to take the opposite tack, but was prevented from doing so. The testimony is arranged in a manner that will more clearly reflect the objectives of the parties at trial and the nature of the error set forth in this brief. The petitioner first presents a short procedural history to explain the posture of the case now before the Court, followed by a statement of material facts.

(A) Procedural History

This case began with the return of an Indictment by the Jefferson County, Kentucky Grand Jury on October 13, 1982.

(Transcript of Record, TR 1) which alleged that Major Crane or George Williams, either alone or in complicity with each other, committed the offense of Murder [Ky. Rev. Stat. (KRS) 507.020] by shooting Randall Todd, a clerk at the Keg Liquor Store on August 7, 1981. (TR 1). A three day trial was held in Jefferson Circuit Court on the indictment and resulted in a conviction for wanton murder and a recommended sentence of 40 years imprisonment. (TR 152). This recommendation was accepted by the trial judge. Final judgment imposing the sentence was entered on January 5, 1984. (J.A. 65-67).

Timely appeal was taken directly to the Supreme Court of Kentucky as required by court rule. [Ky. R. Criminal Proc. (R.Cr.) 12.02]. In that court Crane raised as his sole ground for reversal the refusal of the trial judge to allow him to elicit testimony concerning the circumstances under which his confession was taken for purposes of attacking the believability of that confession. (J.A. 68-69). By opinion rendered February 28, 1985, the judgment of the trial court was affirmed on the ground that "there was no error in excluding from the jury the circumstances relating solely to voluntariness." (J.A. 71). Timely petition for rehearing in the Supreme Court of Kentucky was denied on June 13, 1985 (J.A. 79). Certiorari was granted in this case on December 9, 1985. (J.A. 80).

(B) Statement Of The Case

(1) Discovery Of The Crime And Police Investigation

Randall Todd was found shot in the Keg Liquor Store at about 10:40 p.m. on August 7, 1981. (Transcript of Evidence, TE II p. 9). The police suspected that Todd had been shot during the course of a robbery, but found that no money had been taken from the store. (TE IV 54). Although the police made an extensive search of the liquor store and the area immediately surrounding it, they were unable to find much physical evidence beyond several fingerprints, a footprint, and some tire tracks. (TE II 12, 31-33). None of this evidence indicated the identity of the person(s) involved. As a result of an autopsy conducted on Randall Todd, the police recovered a

single .32 caliber bullet. (TE II 5). However, the bullet was damaged to the point that the state firearms inspector could not determine anything except the caliber of the bullet and the types of pistols from which the bullet could have been fired. (TE II 62-65). No other physical evidence was discovered, and at this point the police had no suspect in the crime. Major Crane became involved in the case only after he was arrested on another, unrelated charge.

(2) Arrest And Interrogation Of Petitioner

On August 14, 1981, a juvenile named Patrick Holder was arrested because of his participation in a break-in at a service station the previous night. (J.A. 2). He named Major Crane as his accomplice. Crane was located almost immediately, was arrested and was taken to a police substation. While the police officer was typing an arrest slip,

> [. . .] just out of the clear blue sky, he said, 'I confess.' He said 'I confess.' (J.A. 4).

Although the officer at first ignored the confessions, Crane persisted. In rapid succession he confessed to robbing a hardware store, to shooting a policeman and to robbing some people at a bowling alley. (J.A. 4). It was subsequently learned by police that Crane was not involved in the shooting (J.A. 9-10) and that he was lying about the hardware store robbery. (J.A. 7). However, he denied knowing anything about the shooting at Keg Liquors. (J.A. 5).

The subject of Keg Liquors was brought up again after Crane was brought to the Juvenile Detention Center. (J.A. 13). Crane was talking about the purported robbery of the hardware store. He said that the clerk set off an alarm and when that happened, he fired a shot up in the air. When the police officer pointed out that no one was shot at the hardware store, Crane said that he was talking about Keg Liquors, "where that guy got killed." (J.A. 7). At this point, the police taped a statement from Crane in which he implicated himself in an attempted robbery of the liquor store and in shooting the

clerk. (J.A. 7).[1] In general, the statement showed familiarity with the interior of the liquor store. However, many of Crane's statements were contradicted by facts discovered by the police in their investigation.

Based on Crane's statement and the recorded statement of the co-defendant, George Williams, Crane was charged with murder.

Before the trial began, the petitioner moved to suppress his out-of-court statements. (TR 36). This motion, pursuant to Ky. R. Crim. Proc. (R.Cr.) 9.78 was heard nearly a month before trial. As required by the court rule, the trial judge made findings of fact and conclusions of law as to the voluntariness of the statement. (J.A. 21-22; Supp. TE 73-76). The motion to suppress was overruled. (J.A. 22; Supp. TE 76).

(3) Trial Strategies Of The Parties

In opening statements the parties set out their theories of the case. The prosecutor admitted that his case was premised almost entirely on oral testimony (TE I 10), i.e. on the statements of the petitioner, of George Williams and of Geraldine Crane, the petitioner's mother. (TE I 13-15). For the defense, counsel presented a theory that the story told by Major Crane in his confession was simply that, a story. Counsel proposed to show the incredibility of the confession by showing its inconsistencies with facts known for certain by the police and also by showing the circumstances under which the statement was given. The purpose of evidence concerning the circumstances surrounding the confession was to "cast a doubt on its credibility." (J.A. 23). Before any evidence was taken, the prosecutor moved *in limine* to prevent introduction of evidence concerning the taking of the confession. (J.A. 27). The prosecutor argued that this line of evidence would be an attack on the voluntariness of the confession, a matter that had been settled conclusively at the suppression hearing. (J.A. 27). Defense counsel pointed out that the circumstances surround-

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[1] The transcript of the taped statement is set out in the Joint Appendix on pages 32-40.

ing the taking of the confession were to be used to attack the credibility of the confession, not its voluntariness. (J.A. 27-28). The trial court ruled that defense counsel could not ask specific questions as to the length of time of the interrogation or the fact that the petitioner was alone with police officers during the interrogation. (J.A. 28-29). The trial court noted that the questions the petitioner wished to ask

> [s]eem to the Court to smack of voluntary giving or the nature of the statements being given voluntarily and that is beyond the pale at this point in time. (J.A. 29).

The petitioner did not present testimony concerning the circumstances surrounding procurement of the confession, but did preserve testimony by way of avowal (J.A. 45-53) showing that the petitioner, who was 16 years of age at the time, was kept in a small, windowless 10 by 12 foot room from shortly after 7:00 p.m. until about 8:40 p.m. During this time he was alone in the room with several police officers undergoing interrogation. (J.A. 45-53; Supp. TE 36-37).[2]

(4) Appeal To The Supreme Court Of Kentucky

The jury returned a verdict of guilty on the charge of wanton murder [Ky. Rev. Stat. (KRS) 507.020(b)]. On appeal from this conviction, the petitioner argued that the trial judge erred by refusing to allow him to develop the circumstances surrounding the procurement of the confession and that the error denied him his right to confront witnesses and to present a defense. (Petitioner's Brief on Appeal, p. 7). The petitioner maintained that no worthwhile state purpose was served by exclusion, and that as a matter of state evidence law, the excluded testimony was obviously admissible under the multiple admissibility rule. (Petitioner's Brief on Appeal, pp. 8-10). Accordingly, the petitioner argued that the requirement that a legitimate state interest be shown to justify denial of the two constitutional rights was not met and the rights were improperly denied.

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[2] During the suppression hearing, defense counsel introduced evidence that the petitioner, despite being sixteen years old, was operating at the level of a third or fourth grade child. (Supp. TE 36-37).

In its opinion on the case, the Supreme Court of Kentucky held that the trial court's ruling on the prosecutor's *in limine* motion was, in effect, a ruling that the rejected evidence "related solely to voluntariness and would not be admitted." (J.A. 69). From this ruling that court concluded that "there was no error in excluding from the jury the circumstances relating solely to voluntariness." (J.A. 71). On this basis, the Supreme Court of Kentucky rejected the petitioner's argument and affirmed his conviction. (J.A. 72). Timely petition for rehearing was denied and petitioner now seeks redress in this Court.

SUMMARY OF THE ARGUMENT

In *Jackson* v. *Denno*, 378 U.S. 368 (1964) and *Lego* v. *Twomey*, 404 U.S. 477 (1972), the Court discussed issues pertinent to the determination of a confession's voluntariness and its use as evidence at trial. The Kentucky Supreme Court in its opinion in the case at bar has formulated a rule that precludes the jury from considering evidence relevant to the voluntariness of a confession. The rule is based on the Kentucky court's misinterpretation of the *Jackson* and *Lego* decisions.

The theory of defense in the case at bar was that the confession of the petitioner, who was at the time sixteen years old and operating at a third or fourth grade level, was untrustworthy and unreliable. The Kentucky Supreme Court ruled that the petitioner was properly allowed to introduce evidence that his confession contained inconsistencies and mistakes of fact. However, the court ruled that the trial judge's findings of fact as to the confession's voluntariness were conclusive and the jury could therefore not be presented with evidence related "solely to the issue of voluntariness." Thus, the Kentucky Supreme Court ruled that the petitioner was prohibited from introducing evidence at trial about the circumstances surrounding procurement of his confession, to wit, evidence of the number of police officers who interrogated the petitioner, the length of the interrogation and the dimensions of the room in which the interrogation was conducted. The Kentucky court concluded that such evidence was not relevant to the confession's reliability and credibility and therefore was inadmissible. The

rule adopted by Kentucky violates rights guaranteed to criminal defendants by the Sixth and Fourteenth Amendments.

A rule that a defendant cannot present the jury with evidence relating to the voluntariness of his confession or the circumstances under which it was procured nullifies the right to present a defense. The constitutional violation cannot be avoided simply because a defendant is permitted to introduce evidence related "solely to a confession's reliability and credibility" but not allowed to present evidence related "solely to a confession's voluntariness." The distinction sought to be drawn between the two types of evidence is an artificial one that has no support in logic or constitutional law. Indeed, the jury cannot be expected to correctly determine the reliability and credibility of a confession if it is prohibited from hearing evidence as to its voluntariness or the circumstances surrounding its procurement. The issue of voluntariness relates directly to the confession's reliability and credibility. Facts relating to a confession's voluntariness are inseparably interwoven with facts germane to a confession's believability. This Court has noted that the issue of the truth or reliability of a confession is not the primary consideration of the trial judge in the course of conducting a voluntariness hearing. Yet, the rule adopted by Kentucky prevents the jury from considering all the facts relevant to the reliability of a confession. The rule therefore constitutes a substantial infringement on a defendant's right to confront and cross-examine the witnesses against him and his right to a jury trial.

The effect of the rule is to prevent a defendant from cross-examining witnesses who played a role in the procurement of the confession. Stripped of the right to question witnesses as to the circumstances under which a confession was obtained, defense counsel is left in the position of urging the jury to conclude that a confession is untrustworthy without being able to introduce the specific evidence upon which that conclusion is based. In effect, the defendant is denied the means by which to fully and effectively present his defense.

Moreover, the rule adopted by Kentucky allows the trial judge to usurp the function of the jury by being the final arbiter

of the facts surrounding the taking of a confession. The rule therefore substantially undermines a defendant's right to trial by jury. Kentucky's position is that the findings of fact made by the trial judge are conclusive regarding a determination as to a confession's voluntariness. Those facts are, in effect, to be accepted at trial without challenge by the defense and without question or review by the jury. That situation hardly comports with the fundamental principle of trial by jury. A defendant is, of course, constitutionally entitled to have his guilt or innocence decided by a jury. That right is effectively negated by operation of a law which permits certain evidence, relevant to the issue of guilt or innocence, to be insulated from the jury's consideration.

A primary justification for the rule enunciated by the Kentucky Supreme Court is that jurors are incapable of separating evidence pertaining to voluntariness from evidence pertaining to the confession's credibility and are therefore likely to misuse the evidence. Kentucky's view that jurors have limited ability to properly discern and apply the evidence is supported neither by logic nor practice.

That jurors are indeed capable of making proper use of evidence is reflected in the universal acceptance of the multiple admissibility rule which recognizes that evidence can be admitted for more than one reason at trial. As the appendices to this brief demonstrate, the overwhelmingly majority of jurisdictions permit jurors to consider evidence of a confession's voluntariness or the circumstances surrounding procurement of the confession. This is true whether the jurisdiction allows a jury to make a specific and independent finding as to the voluntariness of a confession or whether such evidence is to be utilized for the purpose of deciding the confession's credibility or the weight it is to be given.

The rule enunciated by the Kentucky Supreme Court divests the jury of its traditional function of being the ultimate fact-finder. The jury's role is, in effect, usurped by the trial judge, who is authorized to make conclusive findings of fact during the course of a voluntariness hearing. The conclusiveness of the judge's findings of fact are not limited to the issue of the

confession's admissibility. The conclusiveness of the judge's factfinding process is intended to permeate the jury's traditional role and bind both the defendant and the jury to passive acceptance of those facts. Trial by jury therefore becomes little more than a fiction.

Usurpation of the jury's function by the trial judge also has an additional due process ramification. The Fourteenth Amendment imposes upon the prosecution the burden of proving a defendant's guilt beyond a reasonable doubt. Evidence pertaining to a confession's voluntariness or the circumstances surrounding its procurement is germane to the issue of guilt or innocence particuarly in cases where a confession is the primary evidence against a defendant. Thus, the question of guilt or innocence may turn largely on the credibility of the confession and the weight attributed it by the jury. Since the issue of the confession's voluntariness and its admissibility is governed by the preponderance of the evidence standard, the Kentucky rule, by making the findings of the trial judge conclusive, operates in a manner designed to insulate evidence relevant to the issue of guilt or innocence from application of the reasonable doubt standard. The result is patently unconstitutional.

Lastly, the Kentucky rule forces a defendant to choose between various rights guaranteed by the United States Constitution. As a justification for its rule, the Kentucky Supreme Court found that evidence of a confession's voluntariness is selective or limited when a defendant does not testify at trial, because the jury would not be apprised of his previous experience with the law, his knowledge of interrogation procedures or his familiarity with his *Miranda* rights. The Kentucky rule therefore penalizes the defendant for exercising his Fifth Amendment right because he is precluded at trial from challenging the voluntariness of his confession. No legitimate interest of the state is advanced by such a rule because the prosecution which introduces evidence supporting a finding of voluntariness would hardly be impaired by the defendant who does not testify and thereby leaves the state's evidence largely unrebutted.

Moreover, the Kentucky rule puts a defendant in the position of being forced to choose between his due process right to have an involuntary confession excluded and his rights to present a defense and confront and cross-examine witnesses. The Kentucky rule would apparently allow a defendant, who did not exercise his right to a voluntariness hearing conducted by the judge, to challenge the voluntariness of the confession during the case-in-chief. On the other hand, a defendant who submitted the initial determination of voluntariness to the trial judge, would not be permitted to present evidence to the jury about the circumstances surrounding procurement of the confession because the facts pertinent to that issue would have been conclusively determined by the judge. The effect of the Kentucky rule is therefore unconstitutional.

In light of the Sixth and Fourteenth Amendment violations delineated above, the Court is urged to rule that a defendant is constitutionally entitled to submit evidence of the voluntariness of a confession and the circumstances surrounding its procurement to the jury so that it can properly determine the confession's reliability, credibility and the weight it is to be given.

ARGUMENT

IN A CRIMINAL CASE A STATE TRIAL COURT VIOLATES THE RIGHTS GUARANTEED TO A DEFENDANT BY THE SIXTH AND FOURTEENTH AMENDMENTS WHEN IT REFUSES TO PERMIT HIM TO PRESENT TO THE JURY THE FACTS RELATING TO THE CIRCUMSTANCES SURROUNDING THE PROCUREMENT OF HIS CONFESSION AND THE WEIGHT TO BE GIVEN THEM WHEN THOSE SAME FACTS HAVE BEEN CONSIDERED AND CONCLUSIVELY DETERMINED BY THE TRIAL JUDGE IN HIS PRETRIAL DETERMINATION OF THE ADMISSIBILITY OF THE CONFESSION.

I

DEVELOPMENT OF THE LAW REGARDING ISSUES PERTINENT TO THE VOLUNTARINESS OF A CONFESSION.

A. United States Supreme Court's Approach: Jackson v. Denno And Lego v. Twomey.

In *Jackson* v. *Denno*, 378 U.S. 368 (1964), the Court held that "A defendant objecting to the admissibility of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." *Id.* at 380. The Court found that rule to be rooted in the Due Process Clause of the Fourteenth Amendment which requires the implementation of procedures designed "to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." *Id.* at 391.

The Court noted that lower courts had adopted several approaches in determining the voluntariness of a confession. In addition to the New York approach which was being scrutinized in *Jackson*,[3] two other major classifications were recognized. *Jackson*, 378 U.S. at 378 n.9. Some jurisdictions followed the Wigmore or orthodox rule "under which the judge himself solely and finally determines the voluntariness of the confession." *Jackson*, 378 U.S. at 378. Other jurisdictions adhered to the Massachusetts rule "under which the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused . . ." *Id.* at 378.

The New York rule was found constitutionally infirm because it did not provide a reliable determination of a confession's voluntariness. The procedure provided no method of determining "whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it." *Jackson*, 378 U.S. at 379. Moreover, there was no indication of how factual disputes were resolved or if they were resolved at all.

Thus, *Jackson* focused on the method by which the threshhold admissibility of a confession was to be determined. Later decisions would more closely examine the interplay between the jury's role as the ultimate fact-finder and the use of a defendant's confession as evidence.

Referring to its decision in *Jackson* v. *Denno*, the Court stated in *Sims* v. *Georgia*, 385 U.S. 538 (1967):

> A constitutional law was laid down in that case that a jury is not to hear a confession unless and until the trial judge

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[3] Under the New York procedure, the trial judge must make a preliminary determination about a confession and exclude it if it could not be considered voluntary under any circumstances. However, if a question existed as to the confession's voluntariness, it was to be admitted into evidence and submitted to the jury which would make the ultimate determination on the voluntariness and truthfulness of the confession. The jury was instructed "that if it found the confession involuntary, it was to disregard it entirely, and determine guilt or innocence solely from the other evidence in the case, . . . if it found the confession voluntary, it was to determine its truth or reliability and afford it weight accordingly." *Jackson*, 378 U.S. at 374-375.

> has determined that it was freely and voluntarily given. The rule allows the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of the defendant but it is not for the jury to make the primary determination of voluntariness. *Id.* at 543-544.

The admission of a confession into evidence does not require the jury to abdicate the historical role it plays in American jurisprudence. The jury is still required to consider and scrutinize a defendant's confession just as it would any other evidence, notwithstanding a judicial determination that the confession is indeed admissible. *Jackson* makes it clear that the Court never intended the jury to abandon its traditional role as the ultimate factfinder. On the contrary, the Court underscored the jury's function:

> The question of the credibililty of a confession, as distinguished from its admissibility, is submitted to the jury in jurisdictions following the orthodox Massachusetts, or New York procedure. Since the evidence surrounding the making of a confession bears on its credibility, such evidence is presented to the jury under the orthodox rule not on the issue of voluntariness or competency of the confession, but on the issue of its weight. Just as questions of admissibility of evidence are traditionally for the court, questions of credibility, whether of a witness or a confession, are for the jury. This is so because trial courts do not direct a verdict against the defendant on issues involving credibility.
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> A finding that the confession is voluntary prior to admission no more affects . . . the jury's view of the reliability of the confession than a finding in a preliminary hearing that evidence was not obtained by an illegal search affects the instruction on or the jury's view of the probativeness of this evidence.

The failure to distinguish between the discrete issues of voluntariness and credibility is frequently reflected in opinion which declare that it is the province of the court to resolve questions of admissibility of confessions, as with all other questions of admissibility of evidence, the province of the jury to determine issues of credibility, but which then approve the trial court's submission of the voluntariness question to the jury. Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U.Chi.L.Rev. 317, 320-321 (1954).

Jackson, 384 U.S. at 386 n.13.

The relationship between the jury's function as factfinder and its consideration of confessions deemed voluntary (and therefore admissible) was also examined several years later in *Lego* v. *Twomey*, 404 U.S. 477 (1972).

Citing its decision in *Rogers* v. *Richmond*, 365 U.S. 534 (1961), the Court noted that the voluntariness hearing required by *Jackson* was not intended to be used as a vehicle by which unreliable confessions were excluded from evidence. "The sole issue in such a hearing is whether a confession was coerced. Whether it be true or false is irrelevant . . ." *Lego* v. *Twomey*, 404 U.S. at 484 n.12. The voluntariness hearing serves a purpose that is separate and distinct from the task that the jury is expected to perform. The Court made that point unmistakably clear in *Lego:*

> Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took away from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. In like measure . . . juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief.

Id. 404 U.S. at 485-486 (Footnote omitted).

While *Jackson* and *Lego* touched upon the respective roles of the judge and jury regarding the admissibility of a confession and its ultimate use as evidence at trial, those decisions do not address the specific issue presented in the case at bar. Neither *Jackson* nor *Lego* has precisely defined the jury's function, as a matter of constitutional law, once a confession has been admitted into evidence.[4] Evidence that is admitted at a hearing to

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[4] One commentator has noted that "*Jackson* . . . impliedly approves permitting the jury to reexamine the voluntariness determination where the judge tentatively admits the evidence . . ." Salt-

determine the voluntariness of a confession necessarily overlaps with the evidence upon which a jury must examine and consider a confession as it would any other evidence. Thus, there exists a need to clearly establish the parameters of the jury's function as it pertains to confessions which are admitted into evidence. The lack of any specific guidelines regarding the issue presented herein has prompted the Kentucky Supreme Court to fashion a rule which not only strips a defendant of his right to present a defense[5] but also undermines his rights of confrontation and cross-examination.[6] Application of the Kentucky Supreme Court's decision on the merits of the case at bar[7] ultimately violates the Due Process Clause of the Fourteenth Amendment and abridges a defendant's right to trial by jury.[8] Thus, it would be useful to analyze Kentucky decisions interpreting *Jackson* and *Lego*.

B. Kentucky's Approach

Jackson v. *Denno* was first considered by Kentucky's highest appellate court in *Bradley* v. *Commonwealth*, Ky., 439 S.W.2d 61 (1969).[9] Bradley challenged the trial court's failure to suppress certain evidence. In upholding the admissibility of the

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zburg, *Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 271, 278 n.27 (1975). Professor Saltzburg concludes that "Even in the majority of jurisdictions where the judge's preliminary determination is final, the defendant has the right to present evidence of coercion because it bears on the weight to be given the confession." *Id.*

[5] *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Washington* v. *Texas*, 388 U.S. 14 (1967); *In re Oliver*, 333 U.S. 257 (1948).

[6] *Pointer* v. *Texas*, 380 U.S. 400 (1965).

[7] *Crane* v. *Commonwealth*, Ky., 690 S.W.2d 753 (1985); (J.A. 68-78).

[8] *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

[9] The Court of Appeals was Kentucky's highest appellate court until 1976 when the Judicial Article of the Kentucky Constitution was adopted and created the Kentucky Supreme Court and an intermediary Court of Appeals. See Section 109 of the Kentucky Constitution.

evidence, the Court noted Kentucky's procedure which provided that "when the evidence presents a question as to whether a person has voluntarily consented to a search, it should be submitted to the jury by an appropriate instruction." *Id.* at 63 (other citation omitted). The court then focused on the implications that *Jackson* v. *Denno* had on Kentucky procedure and concluded that "If the voluntariness of a confession cannot constitutionally be determined solely by the jury which at the same time is determining the defendant's guilt or innocence, neither should the voluntariness of a consent to search." *Bradley*, 439 S.W.2d. at 63. For the purpose of conforming with *Jackson* v. *Denno*, the Kentucky Court of Appeals adopted a rule applicable to the suppression of confessions or other evidence:

> [T]he question of voluntariness (in case of a confession) or consent (in case of a search) should be first determined by the trial judge outside the presence of the jury on the basis of an evidentiary hearing of the pertinent evidence on both sides. Only if the trial court finds the evidence to have been validly obtained is it admissible in evidence before the jury, in which event we think the the trial court should admonish the jury not to consider the evidence unless it finds beyond a reasonable doubt that the defendant freely and voluntarily consented to the search (or, in the case of a confession, that he gave it voluntarily and free of coercion).

Bradley, 439 S.W.2d at 64 (footnotes omitted).

The admonition to which the court made reference in *Bradley* became standard procedure in Kentucky trial practice. See Palmore, *Kentucky Instructions to Juries*, § 12.70, p. 404 (1975).[10] Kentucky thus recognized that the judge and jury must fulfill their individual roles when a confession is offered and received into evidence. The trial judge's initial determina-

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[10] The suggested admonition reads as follows: "The defendant's statement [read to you] [related to you] by the witness . . . must be disregarded, and may not be considered by you to any extent whatever, unless you believe from the evidence beyond a reasonable doubt that the defendant made the statement (if he did so) voluntarily and free of coercion." Palmore at 404.

tion of the voluntariness of a confession was obviously not intended to preempt the jury's function of making an independent examination and consideration of the confession's reliability and credibility.

The distinct roles of the judge and jury were again noted in *Britt* v. *Commonwealth*, Ky., 512 S.W.2d 496, 499 (1974) in which the court held:

> The procedure to be followed when the voluntariness of a confession is challenged was laid out in *Bradley* v. *Commonwealth*, Ky., 439 S.W.2d 61 (1969). On a motion to suppress, the trial court must conduct an evidentiary hearing in chambers. Only if he is satisfied from substantial evidence that the confession was voluntary (and is not otherwise inadmissible) can it then be heard and considered by the jury. Constitutionally, this is all that is required, and if the trial court's determination is supported by substantial evidence it would be conclusive, cf. *Lego* v. *Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), but for the additional protection prescribed in *Bradley* to the effect that if the defendant chooses to carry the question to the jury he may do so with the benefit of an admonition that the evidence shall not be considered unless the jury believes that the confession was made voluntarily and free of coercion. 439 S.W.2d at p. 64.

Although the Kentucky court considered the judge's findings on the voluntariness of the confession to be conclusive, that can only mean the judge's ruling is conclusive in the sense that the confession is deemed voluntary for the purpose of admitting it into evidence. To conclude otherwise would violate the rulings in *Jackson* v. *Denno* and *Sims* v. *Georgia*, which perceive the function of the trial judge as a limited one, i.e. to make the initial determination of whether the confession should be admitted into evidence at all. The trial judge's ruling on the admissibility of the confession can neither encroach nor supplant the jury's duty to weigh the evidence and determine its reliability and credibility. *Jackson* v. *Denno*, 378 U.S. at 386 n. 13; *Sims* v. *Georgia*, 385 U.S. at 544. Indeed, it was specifically noted in *Lego* v. *Twomey* that the requirement of a *Jackson* hearing did not undermine or strip the jury of its duty to determine the credibility, accuracy and weight of a defendant's confession. *Lego* v. *Twomey*, 404 U.S. at 485-486.

Kentucky recognized the mandatory nature of the *Jackson* hearing in *Jones* v. *Commonwealth*, Ky., 560 S.W.2d 810 (1977). The court reiterated its decision in *Bradley* that once the trial judge ruled that a confession was voluntary and therefore admissible, the question of voluntariness must likewise be submitted to the jury. *Id.* at 814.[11]

Ostensibly to avoid recurrence of the situation in *Jones* v. *Commonwealth* and to ensure compliance with *Jackson* v. *Denno*, the Kentucky Supreme Court promulgated Rule of Criminal Procedure (RCr) 9.78. The rule, which was adopted on October 1, 1977 and became effective on January 1, 1978, provides:

> If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

In *Hamilton* v. *Commonwealth*, Ky., 580 S.W.2d 208, 210 (1979), the court explained the intent underlying its promulgation of RCr 9.78:

> The effect of RCr 9.78 is to obviate the procedural requirement of submitting the issue of voluntariness of a confession to a jury following the determination of that issue by the trial judge. Consequently, since we have held in this opinion that the trial judge found that appellant's confession is admissible, it follows that there was no error in his failure to present the issue of voluntariness to the jury. The finding of the trial judge is conclusive and an admonition to the jury was unnecessary.

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[11] "[I]f the confession were found to be voluntary, the failure to submit the question of voluntariness to the jury would constitute error." *Jones*, 560 S.W.2d at 814.

By its decision in *Hamilton*, the Kentucky Supreme Court made it unmistakably clear that it intended RCr 9.78 to operate in such a manner that the jury would be completely divested of its prior role in determining the voluntariness of a confession. Moreover, the clear implication of the court's ruling that the findings of the trial judge were conclusive, was that the jury was rendered incapable of examining and questioning the facts surrounding procurement of the confession. Subsequent decisions of the Kentucky Supreme Court leave no doubt that it fully intended the judge's findings of fact on suppression matters to be binding on the jury and accepted by it without challenge. For all practical purposes, the trial judge was permitted to usurp the function of the jury.

In *Diehl* v. *Commonwealth*, Ky., 673 S.W.2d 711 (1984) the defendant moved to suppress various items obtained in a search of his residence. As grounds for his motion, the defendant argued that his wife's consent to search the premises had not been voluntarily given. A suppression hearing was conducted but the defendant's wife did not testify. Relying on testimony given by the police officers who conducted the search, the trial court found that the defendant's wife voluntarily consented to the search and therefore overruled the motion to suppress. The defendant's wife was called to testify during the case-in-chief and defense counsel sought to question her about the circumstances surrounding her consent to the search. The trial court precluded any questioning on that aspect of the case.

On appeal the defendant argued that the trial court erred by refusing to allow him to question his wife relative to her consent to the search. Relying on RCr 9.78, the Kentucky Supreme Court upheld the trial court's ruling. The court stated, "Where a pre-trial suppression hearing is conducted to determine the admissibility of fruits of a search, the trial court's findings of fact are conclusive as to the issues raised, if supported by substantial evidence. Cf. *Hamilton* v. *Commonwealth*, Ky., 580 S.W.2d 208 (1979)." *Id.* at 712. In light of the court's reliance on RCr 9.78, its ruling is equally applicable to cases involving a defendant's confession. The Kentucky

Supreme Court obviously construes the word "conclusive" in RCr 9.78 as conclusive for all purposes, even to the extent that the jury is passively bound to accept evidence without question.[12] As noted above, such an approach is in direct contravention with the rationale underlying this Court's decisions in *Jackson* v. *Denno*, *Sims* v. *Georgia*, and *Lego* v. *Twomey*.

In its decision in the case at bar, the Kentucky Supreme Court left no doubt that it is within the exclusive domain of the trial judge to determine any issue as to voluntariness of a confession. *Crane* v. *Commonwealth*, Ky., 600 S.W.2d 753, 754 (1985) (J.A. 71). The issue was considered to be completely beyond the scope of the jury's function. *Id.* At trial the petitioner argued that he should be able to develop the circumstances under which his statement was obtained because they were related to the issue of the statement's credibility and reliability. The trial court ruled that evidence pertaining to the length of time over which the petitioner, a 16 year old boy,[13] was questioned, the size of the interrogation room, the number of police officers present and the absence of any social worker or member of the petitioner's family, "related solely to voluntariness" and therefore could not be admitted into evidence and submitted to the jury. *Id.* at 754; (J.A. 69).

Concluding that there "was no error in excluding from the jury the circumstances relating solely to voluntariness," the Kentucky Supreme Court affirmed the ruling of the trial court. *Id.* at 754; (J.A. 71). Relying on its decision in *Diehl*, the court

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[12] The strength of the petitioner's contention is not in anyway dissipated by the fact that the defendant's wife in *Diehl* did not testify at the suppression hearing. The opinion rendered by the Kentucky Supreme Court obviously put the issue of voluntariness beyond the parameters of the jury's role as the ultimate factfinder because even if the defendant's wife testified at the suppression hearing, the court considered the police officer's testimony to constitute substantial evidence for the purpose of upholding the trial judge's decision to admit the evidence obtained in the search.

[13] The petitioner was functioning at a third or fourth grade level. (Supp. TE 36-37).

reasoned that "findings of the trial court were conclusive on that issue." *Id.* at 754-755; (J.A. 71). The court ruled that the petitioner was entitled to present to the jury only issues which related to the credibility of the confession, i.e. factual inaccuracies and inconsistencies contained within the confession. Any question or review of the voluntariness issue was perceived to be "the function of the appellate court, not the jury." *Id.* at 755; (J.A. 71).

The court's ruling was based on several premises which will be discussed in more detail elsewhere in this brief. It is sufficient to say at this point that the court believed that juries were incapable of making a distinction between evidence pertaining to voluntariness and evidence pertaining to crediibility and that the matter was better left in the hands of the trial judge. *Id.* at 755; (J.A. 72). Moreover, the court considered "the issue of voluntariness [to be] a settled issue, no longer debatable except on appeal." *Id.* at 755; (J.A. 72). Acceptance of those premises led the court to conclude that:

> [O]nce a hearing is conducted pursuant to RCr 9.78 and a finding is made by the judge based upon substantial evidence that the confession was voluntary, that finding is conclusive and the trial court may exclude evidence relating to voluntariness from consideration by the jury when that evidence has little or no relationship to any other issue. This shall not preclude the defendant from introduction of any competent evidence relating to authenticity, reliability or credibility of the confession. *Id.* at 755; (J.A. 72).

By precluding the jury from considering the circumstances under which a confession is obtained, Kentucky's position not only abridges a defendant's rights to a jury trial and cross-examination but also creates a tension between the exercise of rights guaranteed by the United States Constitution. As will be shown, Kentucky's myopic view as to a jury's inability to discern the purpose of evidence submitted to it is not shared by other jurisdictions.

II

THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER TO INTRODUCE BY MEANS OF CROSS-EXAMINATION EVIDENCE OF THE CIRCUMSTANCES SURROUNDING THE TAKING OF THE CONFESSION DENIED PETITIONER DUE PROCESS OF LAW AND HIS RIGHT TO CONFRONT WITNESSES.

The petitioner here maintains that he was denied due process of law, guaranteed by the Fourteenth Amendment, by the trial court's ruling that he could not introduce, in chief, evidence of the circumstances which attended the taking of his confession. This ruling denied him the right to put on a defense as that right is set out in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). Because the evidence desired by the petitioner was to be gained through cross-examination of the prosecution witnesses, the trial court's ruling denied him the Sixth Amendment right (made applicable through the Fourteenth Amendment) to confront and cross-examine witnesses. *Chambers*, 410 U.S. at 295. Careful reading of *Chambers* shows that these two closely related rights should be considered separately. In *Chambers* the Court examined the failure to allow cross-examination and the refusal to allow witnesses to be called. 410 U.S. at 295, 298. Together, these erroneous rulings denied Chambers "a trial in accord with traditional and fundamental standards of due process." *Chambers*, 410 U.S. at 302. This Court's ultimate holding was that the facts and circumstances of *Chambers* showed that the rulings of the trial court denied him a fair trial. 410 U.S. at 303. From this, it has been deduced that cases involving denial of the opportunity to put on a defense will stand or fall on their particular merits. Westen, *"The Compulsory Process Clause,"* 73 Mich. L. Rev. 71, 152 (1974); Churchwell, *"The Constitutional Right to Present Evidence: Progeny of Chambers* v. *Mississippi,"* 19 Criminal Law Bulletin 131, 137, 141-143 (1983). Thus, the legal problem to be solved in the present case may be clearly stated: taking into account the deference due state court rules of procedure, did the trial court (and the Supreme Court of Kentucky which

affirmed the lower court's action) deny Major Crane the opportunity to defend himself and to cross-examine witnesses when it refused to allow him to elicit for the jury's consideration facts concerning the circumstances attendant to the taking of his confession on August 14, 1981? The mechanism for determining this question is set out in *Chambers* and has already been employed in this case. Put simply, the propriety of a court's denial of the right to cross-examine and to put forth a defense is decided by examining closely the interests to be served by allowance or denial of the desired action. Because the rights spoken are of "essential" and "fundamental" to a fair trial, their denial or restriction can only be justified by the existence of a legitimate state interest. *Chambers*, 410 U.S. at 295. However, the relative values of the competing interests are to be "closely examined." *Chambers*, 410 U.S. at 295.

The competing interests in the present case are clearly established. As shown in the Statement of the Case, the most powerful evidence against the petitioner was his own out-of-court confession. The Commonwealth of Kentucky had virtually no physical evidence to link anyone with the crime (TE II 12, 31-33). The most important pieces of such evidence were a thirty-two (.32) caliber bullet recovered from the deceased (TE II 5, 62-65) and a half-pint bottle of T.W. Samuels Whiskey (TE II 11). These items corroborated portions of Crane's confession (TE II 46; J.A. 11, 36-37). However, there was really nothing else to link Crane with the shooting except his confession, the confession of the co-defendant, George Howard Williams, and the out-of-court statement of Geraldine Crane, the petitioner's mother.[14] (TE IV 8-19, 62). Williams obviously had reason to minimize his part in the shooting incident. Had he not done so, he would have been charged as the triggerman. (TE III 24-25). However, Williams' out-of-court statement mentioned the half-pint of T.W. Samuels and the use of a thirty-two (.32) caliber

[14] These last two statements were admissible as substantive evidence pursuant to *Jett* v. *Commonwealth*, Ky., 436 S.W.2d 788 (1969), which allows out-of-court statements to be introduced as evidence when the declarant denies making a statement or professes not to remember.

pistol at the liquor store. (TE III 17, 27). Clearly, this was corroborative of the confession given by the petitioner. It was essential to the success of the defense either to exclude the confession given by the petitioner on the grounds of involuntariness or to introduce evidence so it would be disbelieved by the jury. The petitioner invoked Ky. R. Crim. Proc. (R.Cr.) 9.78 to attempt the former course. (TR 36). The trial court, as required, conducted a hearing on suppression and stated its findings and conclusions upon its decision to admit the confession. (J.A. 21-22; Supp. TE 73-76). The petitioner then adopted a trial strategy to show that the factual inaccuracies of the confession and "the very circumstances surrounding the giving of the statement" cast doubt on the credibility of the confession. (J.A. 23). As to the circumstances of the confession, Crane intended to rely on a showing of his age (16 at the time of the shooting), the length of time he was interrogated (one hour and 40 minutes), the size of the room in which the interrogation took place (10 feet by 12 feet), and his isolation in the room with five police officers. (J.A. 23-24, 46-47, 49-50). And, of course, if the petitioner did not testify, the desired evidence would have to be presented through those persons with knowledge of the event, the police officers who conducted the interrogation. This would be accomplished by cross-examining these officers concerning the event.

The interest of the Commonwealth of Kentucky, as it can be inferred from the record of the trial court and the opinion of the Supreme Court of Kentucky, was to prevent relitigation of the issue of voluntariness in front of the jury for fear that the jury would misuse the evidence concerning the taking of the confession and discount its value because it was involuntary. (J.A. 28-29, 52-53). In its opinion, the Supreme Court of Kentucky characterized the evidence sought to be admitted as "solely" related to the voluntariness of the confession. *Crane* v. *Commonwealth*, Ky., 690 S.W.2d 753-754 (1985); (J.A., 71).[15] In

[15] This characterization was repeated in two other places in the opinion. *Crane* v. *Commonwealth*, 690 S.W.2d at 754-755; (J.A. 69, 71).

order to insure the conclusiveness of the determination of voluntariness under R.Cr. 9.78 (which the court said applied the orthodox rule), the Supreme Court of Kentucky ruled that "the trial court may exclude evidence relating to voluntariness from consideration by the jury when that evidence has little or no relationship to any other issue." *Id.* at 754; (J.A. 72). This strict rule was deemed justified by "the dangers inherent in admitting evidence before the jury concerning the circumstances attendant to the taking of the confession . . ." *Id.* at 754; (J.A. 71). These dangers are three in number. First, the court perceived a difficulty in separating the "factors" relating to voluntariness from those relating to credibility. It therefore vested the separation in the hands of the trial judge and not in the minds of the jurors. Second, there was no reason to consider voluntariness because that matter was settled and could only be contested on appeal. Third, the evidence offered is usually "selective" when the defendant does not testify, so that his previous experiences with the law, his knowledge of interrogation procedures and his familiarity with *Miranda* rights are not presented to the jury. *Crane*, 690 S.W.2d at 754; (J.A., 72). When tested against the compelling reasons in this and other cases to allow evidence of the circumstances of the confession, no legitimate state interest in support of the rule announced in *Crane* is evinced.

Examination of the *Crane* rule will be facilitated by a preliminary determination of whether the evidence sought to be adduced at trial is relevant "solely" to the voluntariness of the confession or whether the evidence is relevant to the issue of the confession's credibility and the weight it should be given by the jury. This determination is important to the theory that the excluded evidence was admissible under the multiple admissibility rule which is followed by Kentucky and nearly every other American jurisdiction. However, as will be shown below, in almost all jurisdictions following either the Massachusetts rule or the orthodox doctrine, there is special provision for the presentation to the jury of evidence that obviously bears on voluntariness.[16]

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[16] See argument beginning at p. 28. Also see the tables found in Appendices A 1-4 of this brief.

Evidence is relevant when it tends, in a logical way, to make some proposition more or less true. Evidence is presented on the hypothesis that it is "to effect rational persuasion." I Wigmore, *Evidence*, § 9, p. 664 (Tillers Rev. 1983); *O'Bryan* v. *Massey-Ferguson*, Ky., 413 S.W.2d 891, 893 (1967). Where presentation of certain information to a jury may allow it to reach a reasonable conclusion as to the occurrence of an event or a state of mind, then that information is deemed relevant.[17] It is patent that the excluded evidence would provide at least a partial basis on which the jury could bottom a decision to disbelieve the confession. This is true not because the evidence would raise questions of voluntariness alone, but rather, because the evidence could provide a premise from which to conclude that the petitioner willingly told the police what they wanted to hear. Any number of reasons can prompt a confession. A tendency to confess falsely for personal psychological reasons has been recognized. A defendant may confess to things that he knows about but which he has not done. Comment: *Corroborating False Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 Wis. L. Rev. 1121. It is not unlikely that a suspect would take the great interest shown in him by police as a cue to fabricate a story to impress the police with his exploits. Equally likely is the situation in which the accused of his own misinformation believes that he is required to cooperate with the police to avoid trouble and simply agrees with what is suggested.[18] In any event, there is in this case a use for the excluded evidence that is relevant to the issue of whether and why Major Crane made his confession to the police and whether the jury should believe that he did the things he claimed to have done. Because this

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[17] The Court need not consider at this point whether the evidence is necessarily admissible. The only question at this point is whether the excluded evidence in this case would tend to aid the jury in its decision as to the believability of the petitioner's confession.

[18] Petitioner apparently did so in this case. (J.A., 4, 9). For another example of the second situation see Mayer, "The Murder Dreams," Vol. 49, No. 1, Vanity Fair, p. 82, January, 1986.

evidence is relevant to the credibility of the confession, it was admissible under the multiple admissibility rule.

The rule of multiple admissibility is universally recognized:

> [W]hen an evidentiary fact is offered for one purpose and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity. This doctrine, though involving certain risks, is indispensible as a practical rule. I Wigmore, *Evidence*, § 13, p. 694 (Tillers Rev. 1983).

Wigmore's treatise states that "it is uniformly conceded that the instruction of the court suffices" to avoid the risk of misuse of the evidence so admitted. I Wigmore, *Evidence*, § 13, p. 697 (Tillers Rev. 1983). The rule of multiple admissibility is subject only to the general rule that the trial judge may exclude evidence if he determines that the evidence is unfairly prejudicial, will confuse the issues or waste the court's time. Fed. R. Evid. 403; Weinstein, *Federal Rules of Evidence*, § 403, p. 403-1; McCormick, *Evidence*, 2 Ed., § 185, p. 438-441 (1972); I Wigmore, *Evidence*, § 10a, p. 674 (Tillers Rev., 1983). However, the term "prejudice" as used here has a particular meaning. The term does not denote only damage to the adversary's case. Rather,

> [w]hat is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one. McCormick, *Evidence*, 2 Ed., § 185, p. 439 n. 31.

Thus, in the present case, unless the admission of the circumstances concerning the taking of the confession tended to unfairly prejudice the prosecutor's case, confuse the issues or waste the court's time, the excluded evidence was admissible. The Court will note that justifications for exclusion stated in the opinion of the Supreme Court of Kentucky in this case parallel closely the first two reasons for which evidence can be excluded. Therefore, determination of whether the excluded evidence would have prejudiced or confused the jury may be made at the same time the Kentucky Supreme Court's justifications are tested against this Court's precedents and compared

to other jurisdictions. The third reason posited by the Kentucky Supreme Court will be considered separately.

At this point, it bears noting that the law of the Commonwealth of Kentucky has conformed to the principles just set out. Although the principle is cited most often in connection with "other crimes" evidence, *Gall* v. *Commonwealth*, Ky., 607 S.W.2d 97, 106 (1980); *Jones* v. *Commonwealth*, Ky., 554 S.W.2d 363, 366-368 (1977), it has been used in a number of other contexts. *Cassidy* v. *Berkovitz*, 169 Ky. 785, 185 S.W. 129 (1916); Lawson, *Kentucky Evidence Law Handbook*, 2 Ed., § 1.10(A) (1984). The Supreme Court of Kentucky also subscribes to the belief that the admonition or instruction of the trial court will channel evidence admitted for a limited purpose to that purpose alone. *Commonwealth* v. *Richardson*, Ky., 674 S.W.2d 515 (1984). Therefore, one must look elsewhere for justification of the denial of the petitioner's right to present the circumstances surrounding the procurement of the confession. As shown in the argument that follows, the stated justifications for excluding relevant evidence in this case are not sufficient when compared with the compelling reasons for introduction of this evidence.

According to the opinion in *Crane* v. *Commonwealth*, Kentucky has adopted the orthodox rule by promulgation (by the Supreme Court of Kentucky) of Ky. R. Crim. Proc. (R.Cr.) 9.78. *Crane*, 690 S.W.2d at 754; (J.A. 70). The essence of the orthodox rule, according to that court, is that the trial judge alone shall determine the voluntariness of the statement sought to be excluded. Once voluntariness is determined, the "several states are left to their own procedure as long as adequate safeguards are prescribed." *Crane*, 690 S.W.2d at 754; (J.A. 70). The Kentucky Supreme Court held that *Jackson* v. *Denno*, 378 U.S. 368 (1964) and *Lego* v. *Twomey*, 404 U.S. 477 (1972), require no more. *Crane*, 690 S.W.2d at 754; (J.A. 70).[19] The operation of the orthodox rule after determination of voluntariness, according to the Kentucky court, is that "in

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[19] This Court's conception of the orthodox rule is set out in *Jackson* v. *Denno*, 378 U.S. at 386 n.13.

some cases" the jury is permitted to hear the same evidence not for the purpose of redetermining voluntariness but rather only for the purpose of credibility. The opinion states that this Court has acknowledged that the separation of the evidence for purposes of voluntariness and credibility is difficult. *Id.* 690 S.W.2d at 754; (J.A. 71). This portion of the opinion demonstrates the Kentucky Supreme Court's misperception of the prior holdings of this Court and the operation of the orthodox rule.

In *Lego* v. *Twomey*, 404 U.S. 477 (1972) and in *Spencer* v. *Texas*, 385 U.S. 554 (1967), the Court explained the motives behind the decision in *Jackson* v. *Denno:*

> It is true that the Court in *Jackson* supported its holding by reasoning that a general jury verdict was not a 'reliable' vehicle for determining the issue of *voluntariness* (emphasis added) because jurors might have difficulty in separating the issues of voluntariness from that of guilt or innocence. But the emphasis there was on the protection of a specific constitutional right, and the *Jackson* procedure was designed as a specific remedy to insure that an involuntary confession was not in fact relied upon by the jury. *Spencer*, 385 U.S. at 565.

The Court in *Lego* v. *Twomey*, further explained that its decision in *Jackson*:

> [w]as not based in the slightest on the fear that juries might misjudge the accuracy of confessions and arrive at erroneous determinations of guilt or innocence. That case was not aimed at reducing the possibility of convicting innocent men.
>
> Quite the contrary, we feared that the reliability and truthfulness of even coerced confessions could impermissibly influence a jury's judgment as to voluntariness.
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> * * *
>
> Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury *any evidence* (emphasis added) relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing on its weight and voluntariness. 404 U.S. at 485-486.

It therefore appears that the *Crane* opinion misstates the previous holdings of this Court with respect to the separation of voluntariness and credibility. The Court has never doubted the ability of the jury to reach a proper result as to believability and weight of a confession. The only fear expressed was the reverse situation, that the credibility of a confession would cloud the determination of voluntariness, a matter of federal constitutional law. To this extent, therefore, the opinion in *Crane* erroneously construes this Court's prior decisions.

The *Crane* opinion also erroneously described the operation of the orthodox rule. It stated that after the determination of voluntariness, the jury "in some cases" is permitted to hear the same evidence that was used in the determination of voluntariness. 690 S.W.2d at 754; (J.A. 71). Examination of the decisions and statutes of the jurisdictions which follow the orthodox rule shows that evidence surrounding the circumstances under which a confession is obtained is, as a matter of course, admitted.[20] The petitioner has found that in twenty-six (26) of the thirty-three (33) jurisdictions which have recent appellate decisions, statutes or court rules adhering to the orthodox rule, after the trial court decides to admit the confession,

> [T]he jurors may then accord it whatever weight and credibility they deem proper, taking into account the circumstances under which it was made. *Beaver* v. *State*, 455 So.2d 253, 256 (Ala.Cr.App., 1984). See Appendix A(1), p. 2a.

In federal courts, of course, the admissibility of confessions appears to be determined under the orthodox rule. 18 U.S.C. § 3501(a); Fed. R. Evid. 104(a)(e). The statute allows the jury

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[20] Of course, in those jurisdictions following the Massachusetts rule, all evidence is admitted because the jury is allowed to make a second determination of voluntariness. See Appendix A(4), p. 3a. Eighteen (18) states employ the Massachusetts rule.

to consider evidence of voluntariness but requires the trial judge to instruct the jury to give such weight to the evidence as it feels necessary "under all the circumstances." The evidence rule preserves the right of a party "to introduce before the jury evidence relevant to weight or credibility." Fed. R. Evid. 104(3). Since *Jackson* v. *Denno* was decided in 1964, thirty-five (35) states have adopted statutes or rules of evidence that are essentially the same as Fed. R. Evid. 104. (See Appendix B, pp. 4a-9a). With the exception of New York, which enacted a rule embodying the Massachusetts rule, [11A McKinney's Cons. Laws, Criminal Procedure Law, § 710.70(3), p. 1970)], all statutes preserve the right of the defendant to present evidence that relates to the weight and credibility of the confession. (See Appendix B, pp. 4a-9a). It therefore appears that the *Crane* opinion is in error when it states that only in "some" cases the jury is allowed to hear evidence that bears on voluntariness. This error vitiates the contention that the "dangers" in admitting evidence of the circumstances under which the confession was obtained justified exclusion of that type of evidence in this case. *Id.* 690 S.W.2d at 755; (J.A. 71). This Court has never held that the difficulty in separating voluntariness and credibility reflected on the ability of the jury to discharge its factfinding duties. The experience of other jurisdictions around the country belies any such difficulty. The eighteen (18) jurisdictions employing the Massachusetts rule obviously do not fear improper handling of the evidence by the jury. They entrust a redetermination of voluntariness to the jury. (See Appendix A4, p. 3a). The twenty-six (26) orthodox states in whose precedents are found specific authorizations to adduce evidence before the jury of the circumstances attendant to the taking of a confession, clearly do not fear undue prejudice to the prosecution or confusion of the issues. (See Appendix A1, p. 2a). In federal courts, 18 U.S.C. § 3501(a) directs the courts to permit the jury to hear relevant evidence concerning voluntariness. In the absence of any showing that juries in Kentucky are less able to deal with evidence concerning the taking of a confession than juries in other jurisdictions, the "dangers" perceived by the *Crane* opinion must be dismissed as chimerical. These are not the legitimate interests necessary to

justify abridgement of the petitioner's right to put on a defense and to cross-examine witnesses. The excluded evidence was relevant to credibility and weight, and under the multiple admissibility rule it was admissible. The evidence should have been admitted because it is for the jury, not the trial judge, to determine the weight to be given a confession in determining guilt. Because it is conceivable that a voluntary confession may be untrue, "the defendant must be allowed to tell the jury why he made it." *Palmes* v. *State*, 397 So.2d 648, 654 (Fla., 1981); *State* v. *Vaughn*, 171 Conn. 454, 370 A.2d 1002, 1005 (1976); *Wilson* v. *State*, 451 So.2d 724, 726 (Miss., 1984). And because a criminal defendant is entitled to a trial by jury, *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968), the Court must take care that this important federal right to determination of guilt by a jury is not sacrificed in order to secure the petitioner's right to a separate determination of the voluntariness of his confession.

The third reason put forth by the Kentucky Supreme Court to justify the *Crane* rule is that "the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with *Miranda* rights, etc., are excluded." *Crane*, 690 S.W.2d at 755; (J.A. 72). This perceived danger is unlikely to occur in any case. If by cross-examination the defendant would create an inference that he was inexperienced and unfamiliar with the criminal justice system, a competent and properly prepared prosecutor could by redirect examination or presentation of another witness rebut this inference. It is very unlikely that the police or the prosecutor would charge and prosecute a felony case of any importance without obtaining a complete history of the accused from local files and the National Crime Information Center. And, under Kentucky practice, any testifying defendant who has been convicted of a felony may have his credibility "impeached" by requiring him to admit in front of the jury the existence of the conviction. *Commonwealth* v. *Richardson*, Ky., 674 S.W.2d 515, 517-518 (1984). Thus, whether the defendant testifies or not, the prosecutor will be able to dispel any false impressions as to the inexperience of the defendant. Certainly if the defendant creates through cross-examination a false impression, the

prosecutor can introduce contradictory evidence. Under the multiple admissibility rule, evidence of prior convictions (which are commenced by arrest and perhaps by questioning) would be admissible to contradict the impression raised. In any event, as is shown in this case, the prosecutor often does not wait for provocation to introduce evidence concerning the confession. Here, Detective Branham, on direct examination twice mentioned that he advised Major Crane of his *Miranda* rights. (J.A. 31-32). The second reference was a detailed recitation of the rights and how they were explained. (J.A. 32). Later, Detective Burbrink, on direct examination by the prosecutor, advised the jury that during the course of the confession, the police had been getting the petitioner soft drinks and other things. (TE II 45). The obvious implication of course was that the petitioner had been thoroughly advised before and well-treated during the taking of the statement. The petitioner was not allowed to elicit testimony from these witnesses to show the conditions that existed while the statement was being given and how those conditions might have affected the veracity of his statements and the weight the jury should give them. This perceived fear of the Kentucky Supreme Court is groundless. If the prosecutor can show the circumstances under which the confession was obtained, the same right should be given to the defendant.

As this Court held in *Chambers* v. *Mississippi*, the state cannot interfere with a defendant's right to defend himself and to confront those witnesses who are damaging his case unless a legitimate state interest justifies this interference. No such interest is shown in this case. Therefore, the Court must conclude that denial of the petitioner's attempt to show the jury the circumstances attending the procurement of his confession was error that violated his rights under the Sixth and Fourteenth Amendments.

III

THE CRANE RULE ALLOWS THE TRIAL JUDGE TO USURP THE FUNCTION OF THE JURY AND, WITHOUT ADVANCING ANY LEGITIMATE STATE INTEREST, INSULATES CERTAIN EVIDENCE FROM BEING CONSIDERED BY THE JURY AND THEREBY INFRINGES UPON RIGHTS GUARANTEED BY THE SIXTH AMENDMENT.

A direct result of the rule enunciated by the Kentucky Supreme Court herein is that it creates a substantial distinction in the manner in which the jury fulfills its role as factfinder relative to confessions vis-a-vis other evidence deemed admissible following a suppression hearing. The distinction is an artificial one that leads to absurd results.

Suppression hearings necessarily require the presiding judge to assume a dual role. He or she must rule on a legal question that depends on the facts for its resolution. The judge is inevitably required to make findings of fact, or to at least find a particular version of the facts credible, in order to support his or her ruling on the question of law.[21] This proposition is true regardless of whether the evidence sought to be suppressed is a confession, an identification or a tangible item. To the extent that questions of law and questions of fact necessarily overlap regardless of the nature of the evidence sought to be suppressed, there is no logical basis upon which to treat confessions differently from other evidence in terms of ultimately submitting the evidence to the jury. Yet, this is precisely the effect of the rule Kentucky has adopted.

To illustrate the point, in the context of the Fourth Amendment, let it be assumed that a Kentucky police officer, acting on an informant's tip, frisked the defendant, a convicted felon, who was seated in a car and found a pistol in his coat pocket.

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[21] "Of course, so-called facts and their constitutional significance may be so blended that they cannot be severed in consideration. And in any event, there must be a foundation in fact for the legal result." *Rogers* v. *Richmond*, 365 U.S. 534, 546 (1961).

The defendant is arrested and charged with possession of a handgun by a convicted felon.[22] A search incident to that arrest uncovers heroin on the defendant's person.[23]

On the ground that he was subjected to an illegal search and seizure, the defendant seeks to suppress the gun and the heroin. After a hearing, conducted pursuant to RCr 9.78, the Kentucky trial court overrules the motion to suppress and allows the evidence to be admitted at trial. In reaching the Fourth Amendment issue, the trial judge necessarily makes a finding of fact that the gun and the heroin were in the defendant's possession. If the theory of the defense was that the defendant was not in possession of either the gun or the heroin, then application of the *Crane* rule, as enunciated by the Kentucky Supreme Court, would effectively preclude the defense from presenting that theory to the jury because the factual findings of the trial judge in the suppression hearing are conclusive. *Crane* v. *Commonwealth*, 690 S.W.2d at 755; (J.A. 71-72). That is, of course, an absurd result, but one that is engendered by the rationale underlying *Crane*. Such an anomalous situation would not be limited to cases raising Fourth Amendment issues, but would inevitably encompass any evidentiary matter for which suppression is sought, for example, a photographic identification of the defendant.

Due process of law forbids law enforcement authorities from employing identification procedures which are unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967).[24] "[R]eliability is the linchpin in determining the admissibility of identification testimony . . ." *Manson* v. *Brathwaite*, 432 U.S. 98, 114 (1977). Reliability is determined by weighing the *Neil* v. *Biggers* fac-

[22] KRS 527.040(1) and (2); KRS 532.020(1)(a).

[23] See generally *Adams* v. *Williams*, 407 U.S. 143 (1972).

[24] See also *Neil* v. *Biggers*, 409 U.S. 188, 198 (1972); *Foster* v. *California*, 394 U.S. 440, 442 (1969); *Simmons* v. *United States*, 390 U.S. 377, 383 (1968).

tors[25] against the corrupting effect of the suggestive identification. *Manson*, 432 U.S. at 114. Thus, if a defendant moves to suppress pre-trial identification evidence, the trial judge in determining the admissibility of the evidence must necessarily consider the facts adduced at the suppression hearing and make a finding relative to them.

Although "[t]he reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case, is a matter for the jury . . .,"[26] application of the *Crane* rule totally divests the jury of its role as factfinder. As in determining the voluntariness of a confession, the trial judge when deciding the admissibility of identification evidence must make a finding of fact in order to support his legal conclusion. Surely a defendant's Sixth Amendment rights would be nullified if he were not permitted at trial to challenge the reliability of eyewitness testimony and any police procedures utilized in making the identification. But that is precisely the result produced by the *Crane* rule which would make the factual findings of the trial judge conclusive and binding on the jury. The constitutional infirmities in such a rule are readily apparent. The defendant is provided no opportunity to challenge the evidence or even have it considered by the jury.

The *Crane* rule puts those facts pertinent to the issue of a confession's voluntariness outside the parameters of the jury's function. There is neither any logical basis nor legal justification for treating confessions differently from other evidence which the defendant seeks to suppress. "[T]he proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform." *Watkins* v. *Sowders*, 449 U.S. 341, 347 (1981). The Court noted that in cases involving identification evidence, "the *only* duty of a jury . . . will often be to assess the reliability of that evidence." *Id.* at 347 (emphasis added). The same conclusion is equally true in cases involving confessions. If the jury is required to determine the weight, credibility and reliability to be given a

[25] 409 U.S. at 199-200.

[26] *Foster* v. *California*, 394 U.S. 440, 442 n.2 (1969).

defendant's confession,[27] how can that function be fulfilled if facts pertinent to procurement of the confession are deemed beyond the scope of a jury's role and therefore not disclosed to it?

As a practical matter, "There is no articulable distinction between evidence relative to voluntariness and evidence relative to credibility." *Crane* v. *Commonwealth*, 690 S.W.2d at 755 (Leibson, J., dissenting); (J.A. 73). How can it be found that evidence pertaining to the number of police officers interrogating a 16 year old boy, (who functions at the level of a third or fourth grade child, Supp. TE 36-37), the duration of the interrogation and the size of the interrogation room relates solely to the "voluntariness" of the confession and must therefore be excluded from submission to the jury? Yet, that is precisely the conclusion reached by the Kentucky Supreme Court herein. *Crane* at 754; (J.A. 69, 71). Logic dictates that the foregoing evidence lends itself to a determination of the confession's reliability just as much as any particular statements in the confession that are not borne out by the true facts of the case. Indeed, the very facts excluded herein were of critical importance to the theory of the defense because they provided the jury with a framework of reference as to how the confession was obtained. Those facts constituted a predicate for explaining to the jury why the confession lacked credibility and reliability.[28]

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[27] *Lego* v. *Twomey*, 404 U.S. at 485-486; *Crane* v. *Commonwealth*, 690 S.W.2d at 755.

[28] The error cannot be deemed harmless beyond a reasonable doubt. *Chapman* v. *California*, 368 U.S. 18 (1967). The theory of the defense here was that the petitioner's confession was unreliable and unbelievable. Yet, the jury is required to consider that defense without being apprised of the circumstances surrounding the procurement of the confession. The defense presented by the petitioner is, in effect, nullified because it cannot reasonably be expected that jurors would reach the conclusion that the confession was untrustworthy without being able to consider the specific facts upon which that conclusion was premised.

Even if it were possible to classify evidence as pertaining exclusively to the issue of voluntariness, no legitimate interest is served by insulating juries from considering it. In *Watkins* v. *Sowders*, it was observed that, "The Court in *Jackson* [v. *Denno*] did reject the usual presumption that a jury can be relied upon to determine issues according to the trial judge's instructions, but the Court did so because of the peculiar problems the issue of the voluntariness of a confession presents." *Id.* 449 U.S. at 347. In essence, the problem was that in the course of determining a defendant's guilt or innocence, the jury "may find it difficult to understand the policy forbidding reliance on a coerced, but true, confession. . . Objective consideration of the conflicting evidence concerning the circumstances of the confession becomes difficult and the [jury's] implicit findings become suspect." *Watkins* v. *Sowders*, 449 U.S. at 347 (quoting *Jackson* v. *Denno*, 378 U.S. at 382). See also *Lego* v. *Twomey*, 404 U.S. at 483. The problem has become obviated with adoption of the *Jackson* rule which requires that a defendant who challenges the admissibility of a confession, receive a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined. *Id.* 378 at 380.[29]

The Court's concern in *Jackson* with the manner in which the voluntariness of a confession was determined does not, however, reflect a belief that proper resolution of the issue lies beyond the jury's capabilities. Indeed, that some eighteen (18) states[30] have adopted the Massachusetts procedure, under

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[29] *Jackson*, it must be remembered, dealt only with the constitutional infirmity of the New York procedure governing the determination of the voluntariness of a confession. The Court did not find it necessary to address the constitutionality of the Massachusetts procedure. However, in light of the rule enunciated in *Jackson*, the orthodox and Massachusetts procedures upon which the voluntariness of a confession is determined would presumably pass constitutional muster. *Jackson* at 378 n.8.

[30] See Appendix A(4) to Petitioner's Brief. Indeed, as demonstrated in Appendices A(1) and B (see pp. 2a-9a), twenty-six (26) states and the federal courts adhere to the orthodox rule but allow the jury to consider as evidence the circumstances surrounding the procurement of a confession or its voluntariness.

which the jury passes on the voluntariness only after the judge has fully and independently resolved the issue against the accused,[31] suggests that precisely the opposite conclusion is true. See *Jackson*, 378 U.S. at 378 n.8. There is no constitutional reason why a jury cannot consider whether a confession is voluntary even after the trial court has made a threshold determination that the confession is voluntary and therefore admissible. Indeed, to preclude a jury from deciding that issue violates a defendant's Sixth Amendment rights to have a trial by jury, present a defense, and confront and cross-examine his accusers. The fundamental distinction between a suppression hearing and a trial provides strong support for the petitioner's argument that the Sixth and Fourteenth Amendments are violated by a rule of law that precludes a defendant from submitting to the jury the issue of the voluntariness of his confession.

Vastly different purposes are served by the suppression hearing and the trial. Indeed, the Court has recognized that "the interests at stake in a suppression hearing are of a lesser magnitude than those in a criminal trial itself." *United States* v. *Raddatz*, 447 U.S. 667, 679 (1980). The inherent distinctions led the Court to "conclude that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself." *Id.* Nowhere is the distinction more graphic than in the burden of proof respectively governing suppression hearings and trials.

The initial determination that a confession is voluntary is made on the preponderance of the evidence standard. Once that standard has been met, the confession can be admitted into evidence. *Lego* v. *Twomey*, 404 U.S. at 489. At trial, the prosecution is, of course, held to the standard of proving guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The difference in the standard of proof is especially significant in resolving the issue presented by the case at bar. The proof by which the prosecution hopes to prove guilt is measured by the more stringent reasonable doubt standard.

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[31] *Jackson* v. *Denno*, 378 U.S. at 378.

How can any evidence of a defendant's guilt which is offered at trial be exempted from the jury's application of the reasonable doubt standard? That is, however, the effect of the *Crane* rule. The Kentucky Supreme Court held that a trial judge's determination on the issue of a confession's voluntariness is conclusive and binding on a jury. *Crane*, 690 S.W.2d at 755; (J.A. 71-72). The ruling thus insulates the issue of voluntariness from application of the reasonable doubt standard by the jury at trial and therefore violates the Due Process Clause of the Fourteenth Amendment. Moreover, the *Crane* rule nullifies a defendant's Sixth Amendment right to trial by jury because the jury is not permitted to make its own independent examination of *all* the evidence. The *Crane* rule allows the trial judge to usurp the jury's function as factfinder on the issue of a confession's voluntariness and at the same time preclude evidence surrounding procurement of the confession from being subjected to the reasonable doubt standard. The result is patently unconstitutional. This court clearly did not intend that the Constitution be interpreted in a manner that would allow evidence pertaining to the procurement of a confession to be put beyond consideration of the jury. This point was made unequivocally by the Court in *Lego*, 404 U.S. at 485-486:

> Nothing in *Jackson* [v. *Denno*] questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and *voluntariness* (emphasis added).

As shown above, Kentucky has adopted a law that treats confessions differently from all other evidence which is submitted to a jury. There is no legitimate purpose served by such a rule. It creates an artificial distinction between the use of confessions as evidence and other forms of tangible and testimonial evidence. That distinction has no basis in logic or constitutional precedent. Application of the *Crane* rule results in violations of the rights guaranteed a defendant by the Sixth

and Fourteenth Amendments.

IV

THE *CRANE* RULE IS BASED ON THE FLAWED PREMISE THAT EVIDENCE CAN BE CATEGORIZED AS RELATING EXCLUSIVELY TO EITHER VOLUNTARINESS OR WEIGHT AND CREDIBILITY. THE RULE IS UNCONSTITUTIONAL BECAUSE IT REQUIRES THE DEFENDANT TO CHOOSE BETWEEN THE EXERCISE OF INDIVIDUAL CONSTITUTIONAL RIGHTS.

Resolution of the issue presented in the case at bar reflects the need for a definitive statement of law from the Court especially in light of the multitude of constitutional rights involved. Here, the petitioner was precluded from submitting certain facts surrounding the procurement of his confession to the jury.[32] The rationale underlying such a restriction was that the evidence sought to be introduced by the petitioner was relevant only to the question of the voluntariness of his statement. *Crane* v. *Commonwealth*, 690 S.W.2d at 755; (J.A. 71). However, evidence deemed relevant to the "authenticity, reliability or credibility of the confession" could be presented at trial and submitted to the jury. *Id.* at 755; (J.A. 72).[33]

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[32] Evidence that was ruled inadmissible at trial was placed in the record by avowal. The evidence included: 1) the length and duration of the petitioner's interrogation, 2) the absence of any of petitioner's family members or social workers from the interrogation, 3) the size of the interrogation room and its lack of windows, and 4) the number of police officers present. (J.A. 46-47, 49-50, 69).

[33] The petitioner was allowed to introduce into evidence factual matters in the confession that were not substantiated by the evidence. Into this category came evidence "that the confession contained a misdescription of the weapon used in the homicide; that it spoke of a burglar alarm when there was none; that it told of taking money from a cash drawer when none was taken, and spoke of a gun being fired which had not been fired." *Crane*, *Id.* at 755; (J.A. 71).

Notwithstanding the efforts of the Kentucky Supreme Court to neatly classify evidence as being related either to a confession's voluntariness or its credibility and reliability, the issue in the case at bar is not one that lends itself to resolution by means of a "bright line" approach. The dissenting justice in the Kentucky Supreme Court was absolutely correct in his observation that:

> There is no articulable distinction between evidence relevant to voluntariness and evidence relevant to credibility. Evidence that a confession was coerced, of physical or psychological intimidation surrounding the taking of the confession, is relevant to its credibility. It bears on its truthfulness.

Crane, *Id.* at 755 (Leibson, J., dissenting); (J.A. 73).[34] There is no logical or pragmatic basis upon which to categorize evidence as being exclusively bearing on a confession's voluntariness or reliability. Evidence as to either point must necessarily overlap.

Even if it were possible to classify evidence as pertaining only to a confession's voluntariness or its reliability, there is no reason to believe that a jury is incapable of fulfilling its role as factfinder on the subject of confessions as opposed to any other evidence. The jury does not determine the admissibility of the confession. What it does do is weigh "the contradictory evidence and inferences and draws the ultimate conclusion as to the facts." *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 700-701 (1962). Whether a jurisdiction adheres to either the orthodox or Massachusetts procedure governing the admissibility of confessions, the trial judge's

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[34] See also *United States* v. *Bear Killer*, 534 F.2d 1253, 1258 (8th Cir. 1976), wherein the court noted, "The presence of duress in the procurement of in-custody statements is clearly relevant to their reliability." Citing *Lego* v. *Twomey*, 404 U.S. at 484-486. The Eighth Circuit's conclusion was based on the premise that exclusion of any evidence surrounding the taking of a confession makes impossible "the fulfillment of a jury's duty to give the statements such weight as they deserve under all the circumstances." *Bear Killer*, 534 F.2d at 1258.

independent determination as to a confession's admissibility obviates the danger that such evidence might be misused by the jury.

The right to trial by jury guarantees a defendant that the question of guilt or innocence will be decided by his peers. The right cannot be effectuated if certain evidence is not submitted to the jury. For similar reasons, the right to confrontation and cross-examination is nullified because the trial judge's ruling on the voluntariness of a confession puts that subject "off limits" as far as being challenged by the defense through questioning the interrogating police officers.[35] Moreover, the right to present a defense is substantially impaired where, as here, a defendant is denied the opportunity to fully contest the credibility and reliability of the principal piece of evidence upon which the prosecution seeks to obtain a conviction.

The constitutional infirmities of the *Crane* rule are not limited to the Sixth Amendment violations delineated above. The infirmities likewise reach the Due Process Clause of the Fourteenth Amendment. "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession . . ." *Jackson* v. *Denno*, 378 U.S. at 376 [citing *Rogers* v. *Richmond*, 365 U.S. 534 (1961)]. See also, *Brown* v. *Mississippi*, 297 U.S. 278, 286 (1936). The due process clause also requires that the prosecution prove a defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364. Application of the *Crane* rule precludes a jury from considering those facts surrounding the voluntariness of a confession.[36] Thus, evi-

[35] As the Court has noted, "[U]nder our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth," *Watkins* v. *Sowders*, 449 U.S. at 349 (footnote omitted). The unjustifiable limitation placed on cross-examination by the *Crane* rule unquestionably undermines the search for the truth.

[36] The petitioner maintains that evidence ostensibly supporting the voluntariness of a confession is indistinguishable from evidence relating to the confession's credibility and reliability. For that reason, any evidence pertinent to the procurement of the confession must be submitted to the jury if it is to properly fulfill its role as the ultimate factfinder.

dence germane to the guilt or innocence of the defendant is placed beyond the purview of the jury's traditional role as arbiter of the facts and, as a consequence, becomes insulated from application of the reasonable doubt standard. That result is patently unconstitutional because there is no justification for allowing any evidence of guilt to escape the scrutiny of the reasonable doubt standard.

An additional consideration that warrants rejection of the *Crane* rule is that it forces a defendant to choose between the exercise of his individual constitutional rights. The problem manifests itself in two ways, one of which involves rights guaranteed by the Fifth, Sixth and Fourteenth Amendments.

One of the premises upon which the Kentucky Supreme Court anchored the *Crane* rule was its perception of several "dangers inherent in admitting evidence before the jury concerning the circumstances attendant to taking the confession . . ." *Crane*, 690 S.W.2d at 755; (J.A. 71). A perceived danger was that "the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with *Miranda* rights, etc., are excluded." *Id.* at 755; (J.A. 72). The court's perception of the "danger" in admitting evidence relating to the circumstances by which a confession is obtained is groundless and causes a defendant to be penalized for the exercise of his Fifth Amendment right not to testify. By exercising his Fifth Amendment right at trial, the defendant is precluded from challenging the voluntariness of his confession. He is effectively stripped of his right to confront witnesses and present a defense. No legitimate interest of the state exists which would justify extracting such a severe penalty for the exercise of a defendant's constitutional right not to give testimony at his trial. The prosecution is not hindered or impaired in the presentation of its case simply because the defendant does not testify.

The Kentucky Supreme Court no doubt envisioned a situation where a defendant, by exercising his right not to testify, would mislead the jury or cause it to make unwarranted inferences concerning the circumstances surrounding procure-

ment of the confession. The court's fear, however, will largely go unrealized because the prosecution will presumably spare no effort to present evidence to the jury that a defendant's confession was made voluntarily without coercion and only after scrupulous protection of the defendant's constitutional rights. A defendant who does not testify at trial leaves the state's evidence essentially, if not entirely, unrebutted. In such a situation, the defendant does more to undermine his own case than he does to weaken the prosecution's evidence. If defense counsel is indeed able to utilize cross-examination for the purpose of demonstrating that his client's confession was involuntary and therefore untrustworthy, it would be a simple matter for the prosecutor to negate such a notion through the proper use of rebuttal evidence.

The prosecution suffers no real damage from the defendant's exercise of his Fifth Amendment right in the foregoing situation. The defendant, on the other hand, is forced into a position of having to forego the exercise of his Sixth and Fourteenth Amendment rights because he has exercised one of his Fifth Amendment rights. The dangers perceived by the Kentucky Supreme Court in this situation are more imaginary than real.

The second constitutional dilemma thrust upon the defendant pits the exercise of his Sixth Amendment rights against rights guaranteed him by the Fourteenth Amendment. Under the analysis of the Kentucky Supreme Court, a defendant who seeks to challenge the voluntariness of his confession, must choose between his due process right not to be convicted on the basis of an involuntary confession and the complete exercise of the Sixth Amendment rights enumerated heretofore (especially the right to confrontation and cross-examination). Prohibiting the defendant from submitting to the jury any evidence on the issue of the "voluntariness" of his confession raises numerous violations of rights guaranteed by the Sixth Amendment. The *Crane* rule presumably would allow a defendant, who concedes the admissibility of his confession and does not challenge its voluntariness, pursuant to RCr 9.78, to present in his defense at trial *all* evidence surrounding procurement of the confession. The *Crane* rule thus operates in a

manner designed to force a defendant to choose which of his constitutional rights he will exercise. As in *Simmons* v. *United States*, 390 U.S. 377, 394 (1968), the Court should "find it intolerable that one constitutional right should have to be surrendered in order to assert another."

Due to the constitutional infirmities underlying the law enunciated by the Kentucky Supreme Court herein, the petitioner respectfully urges the Court to rule that any and all evidence relevant to the procurement of a defendant's confession be submitted to the jury which, in the exercise of its traditional role as arbiter of the facts, is to decide the weight, reliability and credibility to be given said evidence.

CONCLUSION

For the foregoing reasons, the petitioner, Major Crane, respectfully submits that the judgment of the Kentucky Supreme Court should be reversed and remanded with directions to grant a new trial.

Respectfully submitted,

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APPENDICES

APPENDICES

Four categories are used in the tables compiled here. The jurisdictions are divided first into orthodox or Massachusetts rule jurisdictions. The orthodox jurisdictions are further divided according to whether they have specifically held that the circumstances surrounding the taking of a confession are admissible in evidence to give the jury a basis on which to judge the weight and credibility of the confession. Kentucky, of course, has held that circumstances surrounding the taking of a confession are not admissible. Appendix A simply lists the jurisdictions according to the four categories. Appendix B sets out the rules, statutes and precedents on which the categorizations were made. The selection criteria are set out at the end of these Appendices.

APPENDIX A

(1) Orthodox Rule—Circumstances Admissible

Federal Courts
Alabama
Alaska
Arizona
California
Connecticut
Florida
Illinois
Indiana
Iowa
Kansas
Louisiana
Maine
Michigan
Minnesota
Mississippi
New Jersey
North Carolina
Ohio
South Dakota
Tennessee
Utah
Virginia
Washington
West Virginia
Wisconsin

(2) Orthodox Rule—No Specific Ruling

Arkansas
Delaware
Hawaii
Idaho
Montana
Wyoming

(3) Orthodox Rule—Circumstances Not Admissible

Kentucky

(4) Massachusetts Rule

Colorado
Georgia
Maryland
Massachusetts
Missouri
Nebraska
Nevada
New Hampshire
New Mexico
New York
North Dakota
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
Texas
Vermont

APPENDIX B

(1) Orthodox Rule—Circumstances Admissible

Federal Courts	18 U.S.C. § 3501 Fed. R. Evid., Rule 104 *United States* v. *Smith*, 638 F.2d 131 (9th Cir., 1981)
Alabama	*Beaver* v. *State*, 455 So.2d 253, 256 (Ala. Cr. App., 1984) *Malone* v. *State*, 452 So.2d 1386 (Ala. Cr. App., 1984) *Ex Parte Singleton*, 465 So.2d 443 (Ala. 1985)
Alaska	*Stobangh* v. *State*, 614 P.2d 767 (Alas., 1980)
Arizona	17A Ariz. Rev. Stat., Rules of Evidence, Rule 104, p. 7 (1977) *State* v. *Burns*, 691 P.2d 297, 301 (Ariz., 1984)
California	29 West Ann. Calif. Codes, Evidence § 406, p. 285 (1965) *People* v. *Carroll*, 84 Cal. Rptr. 60, 66 (Cal. App., 1970) *People* v. *Jimenez*, 580 P.2d 672 (Cal., 1978) *People* v. *Garcia*, 184 Cal. Rptr. 353 (Cal. App., 1982)
Connecticut	*State* v. *Vaughn*, 370 A.2d 1002 (Conn., 1976)
Florida	6B Fla. Stat. Ann., § 90-105 (1976) *Palmes* v. *State*, 397 So.2d 648 (Fla., 1981)
Illinois	38 Ill. Stat. Ann., Code of Crim. Proc., § 114-11(f), p. 343 (1963) *People* v. *Nicholls*, 245 N.E.2d 771 (Ill., 1969)
Indiana	*Long* v. *State*, 422 N.E.2d 284, 286 (Ind., 1981)
Iowa	Iowa R. Evid. 104 (1983)
Kansas	4A Kan. Stat. Ann. § 60-408, p. 144 (1964) 2A Kan. Stat. Ann. § 22-3215, p. 486 (1970) *State* v. *Miles*, 662 P.2d 1227, 1235 (Kan., 1983) *State* v. *Mzitickteno*, 658 P.2d 1052 (Kan. App. 1983)

Louisiana	*State* v. *Hammler*, 312 So.2d 306, 310 (La., 1975)
Maine	Maine R. Evid. 104 (1976) *State* v. *Clark*, 475 A.2d 418, 421 (Me., 1984) *State* v. *Curtis*, 399 A.2d 1330, 1333 (Me., 1979)
Michigan	Michigan R. Evid. 104 (1978) *People* v. *Spivey*, 310 N.W.2d 807 (Mich. App., 1981)
Minnesota	Minn. R. Evid. 104 (1977) *State* v. *Orscanin*, 266 N.W.2d 880 (Minn., 1978) *State* v. *Orscanin*, 283 N.W.2d 897, 901 (Minn., 1979)
Mississippi	*Wilson* v. *State*, 451 So.2d 724, 726 (Miss., 1984)
New Jersey	2A N.J. Stat. Ann., § 84-A-Rules of Evidence 8(3) (1985 pocket part), p. 51 (1976) *State* v. *Hampton*, 294 A.2d 23,35 (1972)
North Carolina	N.C. Stat. § 8 C-1, Rule 104 (1985 Repl., 1983) *State* v. *Romero*, 286 S.E.2d 903, 905 (N.C. App., 1982) *State* v. *Hinson*, 311 S.E.2d 256 (N.C., 1984)
Ohio	8 Baldwin's Ohio Revised Code, Ohio R. Evid. 104, p. 11 (1980) *State* v. *Wilson*, 456 N.E.2d 1287, 1292 (Ohio App., 1982) *State* v. *Perry*, 237 N.E.2d 891 (Ohio, 1968)

Tennessee	*State* v. *Pursley*, 550 S.W.2d 949, 950 (Tenn., 1977)
Utah	9 B Utah Code Ann., 1977 Repl. Volume, pocket part, Rule 104 (1983) *State* v. *Allen*, 505 P.2d 302, 304 (Utah, 1973)
Virginia	*Wilson* v. *Commonwealth*, 255 S.E.2d 464 (Va., 1979)
Washington	Title 10, Rev. Code Wash. Ann., Cr.R. 3.5, p. 270-271 (1973)
West Virginia	1A West Va. Code, W. Va. R. Evid. 104, 1985 pocket part, p. 39-40 (1985) *State* v. *Mason*, 249 S.E.2d 793, 798 (W. Va., 1978)
Wisconsin	Wisc. Stat. Ann., Rules of Evidence, § 901.04 (1974) *Turner* v. *State*, 250 N.W.2d 706 (Wis., 1977)

(2) Orthodox Rule—No Specific Ruling

Arkansas	3A Ark. Stat. Ann., § 28-1001, Rule 104 (1976) *Hall* v. *State*, 634 S.W.2d 115 (Ark., 1982)
Delaware	16 Del. Code Ann. (1981 Repl. Vol.), Uniform R. Evid. 104, p. 495 *Flamer* v. *State*, 490 A.2d 104, 116 (1984)
Hawaii	Haw. Rev. Stat., Ch. 626, Haw. R. Evid. 104, p. 5 (1981)
Idaho	Idaho Rules of Evidence Rule 104, pocket part (effective 1 July 85)
Montana	Mont. R. Evid. 104 (1977) State v. *Smith*, 523 P.2d 1395 (Mont., 1974) *State* v. *Camitsh*, 626 P.2d 1250 (Mont., 1981)
Wyoming	Wyo. R. Ev. 104, p. 320 (1978)
South Dakota	7 South Dakota Codified Laws (1979 Rev.) § 19-9-11 (Rule 104) 1978 *State* v. *Thundershield*, 160 N.W.2d 408 (S.D., 1968)

(3) Orthodox Rule—Circumstances Inadmissible

Kentucky	Ky. R. Crim. Proc. 9.78 *Crane* v. *Commonwealth*, 690 S.W.2d 753 (Ky., 1985)

(4) Massachusetts Rule

Colorado	7B Colo. Rev. Stat. (1984) Repl. Vol.) ch. 33, Rule 104, p. 661 (1980) *People* v. *Salvador*, 539 P.2d 1273 (Colo., 1975) *People* v. *Rex*, 689 P.2d 669 (Colo. App., 1984)
Georgia	*State* v. *Simonton*, 260 S.E.2d 487 (Ga. App., 1979) *State* v. *Summers*, 325 S.E.2d 419 (Ga. App., 1985)
Maryland	*Brittingham* v. *State*, 492 A.2d 354 (Md. App., 1985) *Bellamy* v. *State*, 435 A.2d 821, 824-825 (Md. Spec. App., 1981)
Massachusetts	*Commonwealth* v. *Garcia*, 399 N.E.2d 460 (Mass., 1980) *Commonwealth* v. *Medeiros*, 479 N.E.2d 1371, 1382 (Mass., 1985)
Missouri	*State* v. *Cleveland*, 627 S.W.2d 600 (Mo., 1982) *State* v. *Gantt*, 644 S.W.2d 656 (Mo. App., 1982) *State* v. *Mitchell*, 611 S.W.2d 211, 214 (Mo. Banc., 1981)
Nebraska	2A Neb. Rev. Stat. (1979 Reissue) § 27-104, p.3 (1975) *State* v. *Bodtke*, 363 N.W.2d 917 (Neb., 1985)
Nevada	3 Nev. Rev. Stat. 47 100 (1971) *Carlson* v. *State*, 445 P.2d 157, 159 (Nev., 1968) *Laursen* v. *State*, 634 P.2d 1230 (Nev., 1981)
New Hampshire	*State* v. *Squires*, 48 N.H. 364, 369 (1869) *State* v. *Reed*, 207 A.2d 443, 446 (1965)

New Mexico	N.M.R. Evid. 104 (1973) *State* v. *Ortega*, 419 P.2d 219, 223 (N.M., 1966)
New York	11A McKinney's Consolidated Laws, Criminal Procedure Law, § 710.70(3), p. 180 (1970) *People* v. *Graham*, 447 N.Y.S.2d 918, 432 N.Ed.2d 790 (N.Y., 1982)
North Dakota	*State* v. *Skjonsby*, 319 N.W.2d 764, 781 (N.D., 1982) 5B North Dakota Century Code (Repl. Vol.), 1985 pocket part, p. 173, N.D. R. Evid. 104 (1976) N.D. R. Crim. Proc. 17.1
Oklahoma	12 Okla. Stat. Ann., Evid. Code, § 2105, p. 106-108 (1978) *Bowers* v. *State*, 648 P.2d 835 (Okl.Crim.App., 1982) *Smith* v. *State*, 674 P.2d 569 (Okl.Crim.App., 1984)
Oregon	1 Ore. Rev. Stat. Ch. 40, Title 4 (1985 Repl.), Evid. Code 40.030, R. 104 (1981) 1 Ore. Rev. Stat. (1985 Repl.) § 135.37 (1973) *State* v. *Brewton*, 395 P.2d 874 (Ore., 1964) *State* v. *Allen*, 398 P.2d 477 (Ore., 1965)
Pennsylvania	19 Penn. Cons. Stat. Ann., Pa. R. Crim. Proc. Rule 323(j) (1965) West's Rules Pamphlet, 1985 Pa. Rules of Court, Rule 323(j), Comment, p. 759 (1985) *Commonwealth* v. *Coach*, 370 A.2d 358 (Pa., 1977)
Rhode Island	*State* v. *Bello*, 417 A.2d 902, 904 (R.I., 1980) *State* v. *Verlaque*, 465 A.2d 207 (R.I., 1983)
South Carolina	*State* v. *Chasteen*, 88 S.E.2d 880 (S.C., 1955) *State* v. *Cannon*, 151 S.E.2d 752, 756 (S.C., 1966)

Texas	4A Vernon Tex. Stat. Ann., Code Crim. Proc., Art. 38.22, p. 263-264 (1965) *Ross* v. *State*, 504 S.W.2d 862, 864 (Tx. Crim. App., 1974)
Vermont	Vt. Stat. Ann., V. R. Evid. 104, p. 309 (1983) *State* v. *Harbaugh*, 326 A.2d 821 (Vt., 1974)

HOW THE TABLES WERE COMPILED

Since the Court's decision in *Jackson* v. *Denno* in 1964, thirty-five states have, by statute or court rule, adopted procedures similar to those found in Fed. R. Evid. 104 and 18 U.S.C. §3501. Reliance on a Rule 104 procedure does not necessarily result in easy identification as an "orthodox" or a "Massachusetts" rule state. Typically, the last subsection of the rule adopted provides that submission of the question of admissibility to the trial judge does not "limit the right of the party to introduce before the jury evidence relevant to weight or credibility." [e.g. Fed. R. Evid. 104(e)]. Reservation of the right of the party to introduce such evidence does not necessarily tell the reader whether a party may introduce evidence of the circumstances under which the confession was obtained as bearing on its weight or credibility. The admissibility of such evidence in those jurisdictions which follow the "Massachusetts" rule is axiomatic. Of course, to the extent that evidence concerning the circumstances surrounding the confession tells the jury something useful about the truthfulness of the confession, such evidence should always be admissible.

In preparing these tables, the petitioner did not place a jurisdiction in either the "Orthodox, Circumstances Admissible" or "Massachusetts" rule categories unless by statute, court rule or appellate decision that jurisdiction has stated positively which rule was to be followed. All authorities cited are the most recent that could be found. Where a statute or court rule states the procedure followed, the petitioner has attempted to include a judicial precedent construing the new procedure. However, since Fed. R. Evid. 104(e) merely preserves current state practice, the petitioner has relied on cases decided before the enactment of the statute or rule in those situations where it is evident that the statute or rule has not changed the state's practice. Primarily, this was done when the state has considered the new statute or rule but has not announced a change in procedure. Where the state has never ruled specifically that circumstances regarding the taking of a

confession are admissible, the petitioner listed the state in subsection (B) of the orthodox rule. In many of these instances there is a strong indication that circumstances are admissible but because there is no positive statement one way or the other, the petitioner has not placed these jurisdictions in either the orthodox or Massachusetts list. Kentucky is the only state found to hold specifically that the circumstances surrounding the taking of a confession are inadmissible and therefore is listed in a third subsection of the orthodox rule.

No. 85-5238

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MAJOR CRANE, - - - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In a criminal case, does a state trial court deny a defendant's Sixth and Fourteenth Amendment rights when, after the trial court determines that the confession was voluntarily made, and therefore constitutes admissible evidence, it excludes from the jury's consideration evidence relating to voluntariness which has little or no relationship to any other issue?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-5238

MAJOR CRANE, - - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

OPINIONS BELOW

Petitioner has correctly set forth the pertinent opinions below.

JURISDICTION

Respondent accepts petitioner's statement of the jurisdictional facts.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks relief before this Court under the Sixth and Fourteenth Amendments to the United States Constitution and accurately sets forth the relevant provisions.

COUNTERSTATEMENT OF THE CASE

A. Procedural History

The procedural history is correctly set out in petitioner's brief.

B. Facts of the Crime

At approximately 10:40 p.m. on August 7, 1981, Randall Todd, a clerk at Keg Liquors in Louisville, Kentucky, was found dead. Apparently no money was taken from the store (Transcript of Evidence, "TE," Volume II, 33). A half-pint bottle of W. T. Samuels whiskey was on the counter (TE II 11). A brown paper sack was also discovered at the scene (TE IV 79).

C. The Suppression Hearing

A week after the murder, police received a tip that implicated Major Crane in a gas station burglary (Transcript of Suppression Hearing "TH" 6-7; Joint Appendix, "JA," 2-3). Crane was arrested and taken to a police sub-station. He was immediately informed of his Miranda rights. Petitioner replied: " . . . [Y]eah, I know, I have been through this before" (JA 3). Crane's aunt was contacted at once and told police that she and petitioner's mother would come to the detention center within an hour (JA 4).

While police were typing an arrest slip petitioner spontaneously said, "I confess." The officer ignored Crane until he began to detail cases which the officer knew were unsolved (*Id.*).

Because of petitioner's admissions, the officer decided to take him to the Youth Bureau at City Headquarters to allow county officers to question Crane. On the way, petitioner was asked if he knew about the Keg Liquors robbery. Petitioner denied any knowledge and the matter was dropped (JA 5).

Petitioner was processed at the Youth Bureau until 6:59 p.m. He was then taken to the detention center, arriving at 7:08 p.m. Police again called Crane's home but got no answer.[1] Only then was Crane taken to an interrogation room and questioned about the liquor store (JA 6).

Petitioner initially stated that he fired a shot during the robbery of a specific hardware store. When police pointed out that no one was shot in that robbery, Crane explained:

> No, I am talking about Keg Liquors. . . . That is where I am talking about is at Keg Liquors where that guy got killed.
>
> (JA 7)

Police then took a tape recorded statement (*Id.*). The statement began at 7:50 p.m. and concluded at 8:40 p.m. (JA 11).

At the hearing petitioner was permitted to fully cross-examine the arresting officers about the length of the detention and when and where questioning occurred (JA 8-9). Crane elicited testimony that two officers were in the room with him at all times. One other

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[1] In fact police made ten attempts to contact Crane's family during the evening (JA 7).

officer was present during most of the time. Two others were in and out of the room during the questioning. Never were all five in the room at the same time (JA 9). Petitioner also demonstrated that he spoke to no one but police officers until after the confession. One officer said Crane did not ask to use the telephone (JA 11).

In his own behalf, petitioner called his social worker, Charles Burton, as a witness. Burton said Crane had a third or fourth grade academic achievement level in 1981 (TH 37). Burton acknowledged that Crane was already familiar with the juvenile justice system and had a criminal record in juvenile court at the time of the crime. He also said Crane had been evaluated as a sophisticated delinquent (TH 39-40).[2]

Crane testified police asked him repeatedly about a number of crimes (JA 17). He said they threatened to knock his head off if he did not sign a waiver of rights (JA 19). He said he was kept in a windowless room with "about six" policemen during the questioning and that he said he repeatedly asked to call his mother but was refused permission (JA 18-19). Crane testified that some of his confession consisted of things police told him to say and some was simply made up (TH 58, 61, 68).

Crane admitted he knew that he had the right to remain silent and that police are not permitted to strike a suspect (TH 54). He also knew that a coerced statement is inadmissible (TH 64). On cross-examination Crane could not specify any additional threats (TH

[2]Crane did not present any testimony about his intelligence on avowal or in his Kentucky Supreme Court brief.

53). He admitted police did not strike him but insisted that one officer pushed Crane's head (TH 54). Crane's motion to suppress was denied. The trial court found that the statement was admissible and said:

> The Court again points to the fact that it is not involved at this juncture in making a determination as to the truth of the statements, the contents of the statements, oral or recorded, which were given but as to the admissibility which would go towards a protection of the defendant's rights prior to giving statements and the Court has found that his rights were protected. (TH 74)

The court specifically stated that (1) there was no sweating or coercion; (2) there was no overreaching by officers of the Louisville Police Department; (3) there was no delay in taking the petitioner to the Youth Detention Center; (4) in comparing the conflicting testimony between petitioner and the police officers the credibility "lies entirely with the police"; and (5) petitioner has had numerous dealings with the law, is "street wise" and understood his rights (JA 21-22).

D. The Trial

Petitioner in his opening statement claimed that the circumstances surrounding the confession, specifically, the length of the questioning and the fact that petitioner was alone with five officers, showed that the statement was not credible (JA 23-24). Counsel also detailed at length the inconsistences in the statement (JA 24-26).

After the defense opening statement was concluded the prosecution brought a motion *in limine* to prevent the defense from re-examining the issue of voluntariness (JA 27). The court ruled that the defense could not attack the voluntariness of the statement but could bring up any inconsistencies in the statement. The court specifically ruled that the defense could not introduce evidence about the length of the detention or that Crane was alone with the police (JA 28).[3]

The court permitted an avowal as to any matters the defense believed were improperly excluded (JA 29).

At trial the evidence on behalf of the prosecution which incriminated petitioner consisted of two statements Crane made to friends and family, the statement of a co-defendant and Crane's own confession.

Petitioner's mother told police that Crane said he robbed the store and shot the victim (TE IV 62). Crane also told a friend he robbed a liquor store (TE II 57).

The confession of petitioner's co-defendant was also in evidence. His detailed confession accused Crane of the robbery and murder. This statement resolved any inconsistencies regarding the caliber of the weapon and why no money was taken (TE II 28-34; TE IV 8-9).

Crane has not challenged the admissibility of his confession, which contained facts only the killer could know. Crane knew there was a half pint of whiskey

[3]In fact, the jury did hear evidence about the length of the detention (JA 31-32). They also learned that Crane was alone with four officers during the questioning (TE II 45).

on the counter at the time of the killing (JA 36-37; TE IV 47). Crane took a brown paper bag to the store for loot (TE II 21). Such a bag was found at the scene (TE IV 53, 78-79).

As petitioner acknowledges, he was permitted to question the police about his confession. He cross-examined the arresting officer extensively on the numerous factual mistakes in the confession, such as those relating to the time of the crime, whether any money was taken, and whether the store had an alarm system (JA 41-43). He also questioned police about a correction made by Crane as to the actual caliber of the murder weapon (TE II 47-48). Petitioner elicited from the firearms examiner the fact that the caliber mentioned in the taped statement was incorrect (TE II 66).

On avowal petitioner introduced evidence concerning the length of the detention. He also elicited that the room was either ten or twelve feet square and had no windows. Even that testimony was weakened because the only officer who was asked refused to rule out the possibility that the door was left open. He also showed that four or five policemen were present during the questioning (JA 45-~~).

In response the Commonwealth showed that Crane was calm and was permitted to use the restroom. Officers also asked him if he wanted food or drink (JA 48-49). One officer apparently made more than one trip to get Crane various snacks (JA 50).

E. The Appeal

On appeal the Kentucky Supreme Court affirmed. *Crane* v. *Commonwealth,* Ky., 690 S. W. 2d 753 (1985). The court held that the evidence Crane sought to introduce related solely to voluntariness. The court stated that under the orthodox rule followed in the Commonwealth, voluntariness is conclusively determined by the trial court. Kentucky Rule of Criminal Procedure (RCr) 9.78. The court stated that a defendant may introduce any competent evidence relative to the authenticity, reliability or credibility of a confession.

SUMMARY OF THE ARGUMENT

The States follow one of two procedures for determining the voluntariness of a confession. The Wigmore orthodox rule, followed by the majority of states, including Kentucky, holds that the pre-trial determination of the judge on the issue of voluntariness is conclusive and binding upon the jury. At trial the jury is normally instructed that it shall weigh all the evidence, but is not given the option of rejecting the confession as involuntary. Under the Massachusetts rule the trial court makes an initial voluntariness determination; if voluntary the confession is admitted into evidence but the jury is presented the circumstances surrounding its procurement and is instructed that they may reject the confession as evidence entirely if they find it was given involuntarily. The Court has given at least tacit approval to both procedures in *Jackson* v. *Denno,* 378 U. S. 368 (1964) and *Lego* v. *Twomey,* 404 U. S. 477 (1972), and other cases.

As originally applied throughout the states, and as expounded by Wigmore, the purpose of excluding a coerced confession was related to that confession's presumed unreliability; coerced confessions were, Wigmore said, testimonially untrustworthy. Due to the narrow focus of the admissibility inquiry, the trial court was encouraged, indeed, required, to utilize indicia of reliability in making the threshold determination of admissibility. This determination was purely an evidentiary question. The trial court could believe a confession beaten out of a suspect was true and admit it into evidence. The jury would then re-examine all evidence — the circumstances of the confession (the beating) versus the credibility of the statement — and assign it the weight they believed it deserved. The trial court's determination was truly "threshold" because the court determined admissibility by gauging reliability — then the jury was given the facts and told to do the same thing.

This explains repeated references in the case law to the practice of presenting to the jury the circumstances of the confession under the orthodox rule. However, as the Kentucky Supreme Court has recognized, the voluntariness inquiry is no longer concerned with reliability. In fact, this Court has specifically forbidden the trial court to consider indicia of reliability in making its pre-trial voluntariness determination. That determination is now concerned with police misconduct and otherwise insuring that the confession represents the "free and voluntary" choice of the confessor. The

functions of judge and jury no longer overlap under the orthodox rule because the judge determines voluntariness (excluding credibility) while the jury determines credibility (excluding voluntariness).

This Court's movement of the law away from allowing coerced but reliable confessions into evidence is the foundation for the Kentucky Supreme Court's rule in *Crane*. The rule provides that the trial court can exclude from the jury's consideration evidence relating solely to voluntariness (having little or no relation to any other issue) while permitting the introduction of any competent evidence relating to authenticity, reliability, or credibility. It is based upon the validity of the constitutional safeguards provided by the Court and the States in developing strict standards of voluntariness, requiring a pre-trial suppression hearing to fully resolve the issue, and providing for appellate and habeas corpus review.

Petitioner has provided no constitutional basis for a holding by the Court that all circumstances of all confessions are inherently related to credibility and therefore must be admitted before a jury which has no power to reject the confession as evidence on the basis of voluntariness. Although petitioner attacks the fact that the voluntariness of the confession is not re-submitted to the jury (as under the Massachusetts rule), that issue was not raised below.

There are also strong policy considerations for the Kentucky Supreme Court's rule in *Crane*. It reinforces the importance of the judge's independent determination of voluntariness at the pre-trial suppression hearing. It places subtle distinctions between voluntariness and credibility in the hands of the judge, not the jury. It prevents the interjection of conclusively settled preliminary issues into the trial in chief. Finally, it keeps the jury from hearing only one side of the voluntariness issue, since the defendant's prior experience with the law and with police interrogation will be excluded unless the defendant takes the stand. The rule in *Crane* is a logical extension of the orthodox rule based firmly upon the Court's expansion of the voluntariness inquiry. Because the functions of judge and jury no longer overlap, the Kentucky Supreme Court may limit the evidence each may hear to that relevant to the distinct function of each.

Finally, even if the Kentucky trial court erred by limiting the admission of evidence, reversal is not required. Almost all of the facts elicited on avowal were presented to the jury. If error occurred, the case should be remanded to the Kentucky Supreme Court for a determination of prejudice.

ARGUMENT

In his brief, petitioner divides his single argument into four sub-arguments numbered I through IV. Respondent has designated sub-headings by letter and has combined petitioner's sub-arguments I and II in respondent's Argument I.A. and petitioner's sub-arguments III and IV in respondent's Argument I.B.

I.

IN A CRIMINAL CASE, A STATE TRIAL COURT DOES NOT DENY A DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHEN, AFTER THE TRIAL COURT DETERMINES THAT THE CONFESSION WAS VOLUNTARILY MADE, AND THEREFORE CONSTITUTES ADMISSIBLE EVIDENCE, IT EXCLUDES FROM THE JURY'S CONSIDERATION EVIDENCE RELATING TO VOLUNTARINESS WHICH HAS LITTLE OR NO RELATIONSHIP TO ANY OTHER ISSUE.

A. In Light of Recent Developments in the Law the Trial Court's Refusal to Allow Petitioner to Introduce Irrelevant Evidence by Cross-Examination Did Not Deny Petitioner Due Process of Law and His Right to Confront Witnesses.

The petitioner asks the Court to hold that a criminal defendant has a constitutional right to present to the jury all the circumstances surrounding the taking of the confession after the trial judge has conclusively determined, as a matter of constitutional law, that the confession was given voluntarily. This claim is supported neither by logic nor by case law. It proposes a *per se* constitutional rule which is unnecessary and burdensome. Recent developments in the law of confessions provide a constitutional foundation for the rule of the Kentucky Supreme Court in *Crane* v. *Commonwealth,* Ky., 690 S. W. 2d 753 (1985); (JA 68-78), that evidence irrelevant to the issue of credibility need not be given to the jury. The rule in *Crane* is a logical extension of Wigmore's orthodox rule, in use in over half the States, and is a constitutional exercise of a

state's power to delineate between the functions of judge and jury.[4]

Early state and federal court decisions stressed, as did Wigmore, that the question of the *admissibility* of a confession was for the judge and its weight was for the jury. Implicit within this concept was that when the jury considered the confessions they "must take into consideration all the circumstances surrounding them, and under which they were made, including those under which the court declared, as matter of law, they were voluntary."[5] However, the original formulation of the orthodox principle also embodied this result:

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[4]The states have broad powers to establish rules relating to confessions. This Court stated in *Stein* v. *New York,* 346 U. S. 156, 179 (1953):

> The states are free to allocate functions between judge and jury as they see fit.

That statement was reiterated in *Jackson* v. *Denno,* 378 U. S. 368, 391, n. 19 (1964), wherein this Court stated:

> Whether the trial judge, another judge, or another jury, but not the convicting jury, fully resolves the issue of voluntariness is not a matter of concern here. To this extent we agree with Stein that the States are free to allocate functions between judge and jury as they see fit.

See Fletcher v. *Weir,* 455 U. S. 603 (1982).

Consider also the requirement that a confession be corroborated before being admitted into evidence. A finding of corroboration is a question of law because it determines admissibility; in some jurisdictions the question is resubmitted to the jury, while in others it is not. Comment: "Corroborating False Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions," 1984 *Wis. L. Rev.* 1121, 1140 (1984).

[5]*Burton* v. *State,* 107 Ala. 108, 130-131, 18 So. 284, 290-291 (1895), still cited in Wigmore as illustrative of the orthodox rule. 3 Wigmore, *Evidence* § 861 (Chadbourn rev. 1970), at 571.

> It follows that, although the jury may come to the conclusion that the confessions were not voluntary, yet if, from extrinsic evidence, or from their character and circumstances, the jury are satisfied that they are true, the jury should act upon them . . . .[6]

The Chadbourn revision of Wigmore continues to utilize this 1895 case as a fair presentation of the "orthodox principle." Nonetheless, it is elsewhere recognized that the foundation of Wigmore's original orthodox rule has been quietly swept away by this Court's more recent rulings that involuntary confessions are primarily excluded not because they are unreliable, but because exclusion protects a defendant's right to a fair trial and deters police misconduct.

Under common law it was well-established that coerced confessions were excluded because the circumstances of their coercion made them *"testimonially untrustworthy."* Wigmore, *Evidence* §822 (3rd Ed. 1940).[7] In §823 of the same edition Wigmore concluded that:

> (a) A confession is not excluded because of any *breach of confidence* or of good faith. . . . (b) A confession is not excluded because of any *illegality* in the method of obtaining it. . . . (c) . . . [A] confession is not rejected because of any connection with the *privilege against self-crimination.*
>
> *Id.*, at 249; Emphasis in original.[8]

[6] *Id.*

[7] Chadbourn states this thesis was supported by copious documentation. Part of the now exercised test appears in 3 Wigmore, *Evidence* § 822, n. 1, at 329 (Chadbourn rev. 1970); (Emphasis in original).

[8] Reproduced by Chadbourn, *Id.*, at 330.

For this reason the early version of the orthodox rule laid a much broader foundation for admitting a confession into evidence than would be possible today. The scope of inquiry was by definition based upon the *reliability* or trustworthiness of the confession. Review was focused upon whether police actions were of sufficient force or effect so as to produce a false confession.[9] Inherent in this review was the now constitutionally impermissible practice of allowing the trial court to consider the probable reliability of the confession as a strong factor in determining its voluntariness. See *Rogers* v. *Richmond*, 365 U. S. 534, 542-544 (1961). Under this division of function between judge and jury it is clear that the admissibility of the confession was a threshold issue in the sense that the judge would necessarily use the same evidence as the jury — the

[9] *Id.*, at 335. The Court has noted that this same false premise led to the wrong conclusion in *Stein* v. *New York*, 346 U. S. 156 (1953):

> The failure to inquire into the reliability of the jury's resolution of disputed factual considerations underlying its conclusion as to voluntariness — findings which were afforded decisive weight by the Court in *Stein* — was not a mere oversight but stemmed from the premise underlying the *Stein* opinion that the exclusion of involuntary confessions is constitutionally required solely because of the inherent untrustworthiness of a coerced confession. It followed from this premise that a reliable or true confession need not be rejected as involuntary and that evidence corroborating the truth or falsity of the confession and the guilt or innocence of the accused is indeed pertinent to the determination of the coercion issue.

Jackson v. *Denno*, 378 U. S. at 383-384. See also Meltzer, "Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury," 21 *U. Chi. L. Rev.* 317 (1954).

probable reliability of the confession — in reaching the evidentiary conclusion. The jury would naturally receive the same evidence of the circumstances surrounding the confession because this would also be weighed in the finding of guilt. The jury would then get a second chance at the confession because although the *admissibility* of the confession was not a jury issue, the circumstances would be presented to the jury so that the trier of fact could weigh the impact of threats or beatings as tending to produce an untrustworthy statement versus other evidence tending to show that its contents were true.

The foregoing demonstrates that the original limitations of the exclusionary rule regarding confessions presented an entirely different division of labor between judge and jury. Because the judge was concerned with admissibility as a factor of *reliability* — an obvious concern of the trier of fact — there was a natural and unpreventable overlap which justified repeating for the jury the evidence presented as part of the motion to suppress. That justification no longer exists.

In a series of cases the Court gradually expanded the view that the legal question of the admissibility of a confession did not depend upon mere reliability.[10]

[10]See *Lisenba* v. *California*, 314 U. S. 219, 236 (1941) (Purpose of due process "is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."); *Haley* v. *Ohio*, 332 U. S. 596, (1948); *Watts* v. *Indiana*, 338 U. S. 49 (1949); *Brown* v. *Allen*, 344 U. S. 443, 475 (1953) ("When the facts admitted by the state show

(Footnote Continued on Next Page)

This process has been developed to the point where it is obvious that to say that a confession is "involuntary" (and therefore inadmissible as evidence) is to invoke a complex legal standard.[11] This standard now has focused on the Due Process Clause and upon two underlying values (rather than merely reliability) which govern the propriety of the admissibility of this evidence. These underlying values are:

First, confessions obtained by offensive police practices will be excluded even though the reliability of the confession itself is unquestioned. *Rogers* v. *Richmond*, 365 U. S. 534 (1961). Reliable confessions will be excluded even where there is ample evidence apart from the confession to support the conviction. *Malinski* v. *New York*, 324 U. S. 401 (1945); *Stroble* v. *California*, 343 U. S. 181 (1952); *Payne* v. *Arkansas*, 356 U. S. 560 (1958); *Jackson* v. *Denno*, 378 U. S. at 386.

Secondly, confessions obtained under circumstances in which a defendant's free choice is impaired are inadmissible, even if the police do not resort to offensive practices. *Townsend* v. *Sain*, 372 U. S. 293 (1963). The application of the rule of Due Process voluntariness requires an examination of the "totality of circumstances," *Haynes* v. *Washington*, 373 U. S. 503 (1963) where the overpowering of a defendant's free

(Footnote Continued From Preceding Page)

coercion . . ., a conviction will be set aside as violative of due process. . . . This is true even though the evidence apart from the confessions might have been sufficient to sustain the jury's verdict.").

[11]See Grano, "Voluntariness, Free Will, and the Law of Confessions," 65 *Virginia Law Review* 859 (1979).

and voluntary choice is alleged. *Miller* v. *Fenton,* No. 84-5786 (December 3, 1985), slip op., at 13.

The rule of the Kentucky Supreme Court in *Crane* does not represent a startling departure from the orthodox rule; it is, rather, a logical extension of it. The orthodox rule need not, and in some jurisdictions does not, permit the exclusion of evidence relevant only to voluntariness. Nevertheless, to permit this exclusion under limited circumstances and subject it to the protection of state and federal review, as the Kentucky Supreme Court does, is the better practice. This may be amply demonstrated by considering just exactly what it is that petitioner wanted to accomplish in the instant case.

Under the application of the orthodox rule urged by petitioner, once the trial judge admitted the confession into evidence a defendant would have the right to present to the jury *all* the "circumstances" surrounding its procurement. The fiction petitioner asks the Court to adopt is that this evidence is *always* admissible, as a matter of constitutional law, because there is no distinction between evidence relevant to voluntariness and evidence relevant to credibility.

What petitioner wants to do is to relitigate the issue of voluntariness before the jury, even though, under the orthodox rule, the jury does not have the option to reject the confession as involuntary. He wants the jury to reject the confession not because they believe that an impressionable child "made up" a story to please the police, but because they believe (or at least suspect) that the police beat the confession out of him.

He wants to throw upon the police the onus of misconduct when that issue has already been settled in a *Jackson* hearing and where, because of evidentiary rules protecting the defendant from being prejudiced by his past criminal experience, the police are unable to adequately respond. He wants to inject into the jury trial a settled issue which will contribute nothing to the jury's determination of guilt or innocence, since, indeed, the rule in *Crane* specifically provides that no competent evidence relating to the "authenticity, reliability or credibility" of the confession is to be excluded (JA 72). Absent from petitioner's argument is any explanation of how the circumstances of his confession relate to credibility.

The question before the Court is whether the rule established by the Kentucky Supreme Court in *Crane* is constitutional. Petitioner states in his brief, at 42, that there is a need for a definitive statement of law from the Court. In *Lego* v. *Twomey,* 404 U. S. 477, 485-486 (1972), the Court said:

> Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as *free since Jackson as he was before* to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. (Emphasis added).

Lego affirmed that the states *are free* to establish their own procedures so long as these comport with *Jackson* and the U. S. Constitution. The passing reference to "voluntariness" above does not, as petitioner believes, require the issue of voluntariness and its underlying facts be tried again before the jury. Rather, this is a reference to the fact that the Court has found both the Massachusetts rule (retrying voluntariness) and the orthodox rule (leaving the determination to the judge) constitutionally acceptable. *Jackson* v. *Denno,* 378 U. S. at 378-379. There is nothing in either *Jackson* or *Lego* which leads to the conclusion that the rule of the Kentucky Supreme Court in *Crane* is unconstitutional.

a. There Can Be No Prejudicial Restriction of Petitioner's Sixth Amendment Rights in Theory.

Petitioner reasons that any restriction of his opportunity to cross-examine is unconstitutional, citing *Chambers* v. *Mississippi,* 410 U. S. 284 (1973). However, the Court in *Chambers* emphasized that its holding did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures" (*Id.,* at 302-303). See Churchwell, "The Constitutional Right to Present Evidence: Progeny of *Chambers* v. *Mississippi,*" 19 *Criminal Law Bulletin* 131, 137 (1983). Petitioner forgets that not only do the states have an interest in establishing their own procedures but that even when focused upon a relevant issue cross-examination is "[s]ubject always to the broad discretion of a trial judge to preclude

repetitive and unduly harassing interrogation . . . ." *Davis* v. *Alaska,* 415 U. S. 308, 316 (1974). It is axiomatic, of course, that no criminal defendant has a right to cross-examine regarding a matter which is *irrelevant,* as a matter of law, to the issue before the trier of fact.

The rule of the Kentucky Supreme Court in *Crane* cannot be unconstitutional in theory because it specifically allows for the presentation, by cross-examination or otherwise, of all evidence relating to the "authenticity, reliability, or credibility of the confession." *Crane,* JA 72. In other words, all *relevant* evidence is to be presented to the jury.

Throughout his brief petitioner consistently misrepresents this aspect of the rule in *Crane.* Petitioner acts as though the Kentucky Supreme Court has held that the circumstances of a confession are *never* admissible. See, e.g., petitioner's appendices, where Kentucky is stuck out all alone under the heading "Orthodox Rule — Circumstances Inadmissible," at 7a. What the Kentucky court actually held was that "there was no error in excluding from the jury the circumstances [of the confession] relating solely to voluntariness." *Crane,* JA 71. It was the further opinion of the Kentucky court that the proffered evidence did relate solely to voluntariness. *Id.* Under *Crane,* any defendant who could actually show that the circumstances of his confession were relevant to credibility would be entitled to introduce evidence about the taking of the confession.

There is no question that the issue of voluntariness is one which may constitutionally be left to the trial judge alone.[12] *Jackson* v. *Denno,* 378 U. S. at 378; *Lego* v. *Twomey,* 404 U. S. at 490. In those states following the orthodox rule this issue is not submitted to the jury and the trial court's findings are binding and conclusive. Kentucky Rule of Criminal Procedure 9.78. Evidence relating solely to this issue is, by definition, irrelevant to the determination of a defendant's guilt or innocence and the defendant has no right to the introduction of such evidence. The rule of the Kentucky Supreme Court in *Crane* merely clarifies, for the area of confessions, the oldest law on the books. Evidence, to be admissible, must be relevant.

b. Petitioner is Protected Against Any Prejudicial Restriction of His Sixth Amendment Right in Practice.

Because the rule of the Kentucky Supreme Court in *Crane* only sanctions the exclusion of evidence relating to voluntariness when that evidence has "little or no relationship to any other issue" (JA 72), it is not possible for the rule to be a constitutional violation of the defendant's rights in theory. Respondent further submits that it is unlikely to present a constitutional violation in practice.

The cornerstone of petitioner's argument must be that the rule in *Crane* cannot be *constitutionally* applied. Petitioner reasons that this is so because the

[12]Petitioner in fact argues this issue even though the constitutionality of the orthodox rule was not raised below. Brief for Petitioner, at 41. This issue is not before the Court. *Monks* v. *New Jersey,* 398 U. S. 71 (1970).

determination of voluntariness is a "threshold" issue and because there "is no articulable distinction between evidence relative to voluntariness and evidence relevant to credibility." *Crane, supra* at 755 (Leibson, J., dissenting); JA 73.

At first glance this position is appealing. The Kentucky Supreme Court acknowledged in *Crane* that the separation of factors of voluntariness and credibility may be difficult (JA 71-72).[13] The inherent flaw in this formulation, however, is that it necessarily leads to the erroneous idea that the "judge's decision about coercion does not preempt the jury's *need to consider evidence about coercion in deciding guilt.*" *Crane, supra,* at 755 (Liebson, J., dissenting, emphasis added); JA 74. Any issue of coercion, however, is decided by the trial court as a matter of law; the issue must be fully resolved before the confession is admitted. *Miller* v. *Fenton, supra,* at 11; *Jackson,* 378 U. S. at 387. To argue that the jury needs to consider coercion in deciding guilt is asking the jury to consider, for example, that the defendant's *voluntary* confession is not true because the police tortured the defendant for days to obtain it!

This Court's voluntariness standard, focusing on factors other than reliability, makes it unlikely that a criminal defendant's Sixth Amendment or Due Process rights will be unduly restricted by the *Crane* rule. This

[13]That has not prevented this Court, however, from prohibiting the trial judge from considering indicia of reliability in his or her determination of the voluntariness of the confession at the suppression hearing. *Rogers* v. *Richmond,* 365 U. S. 534, 545 (1961).

is so for two reasons. First, the divided functions of judge and jury no longer overlap. The Court has made it clear that its legal standard of voluntariness is to be applied in as broad a manner as possible and may relate to the specific, individual weaknesses of that particular criminal defendant. *Miller, supra,* at 12. There is no longer any reason for the jury to weigh the circumstances of the confession which relate solely to voluntariness and have little or no relationship to any other issue. Second, the Court in *Jackson* v. *Denno,* 378 U. S. at 380, held that a "defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." This hearing and any exclusion of evidence during the trial in chief would be fully reviewable at the state and federal levels. This protects the defendant from an erroneous restriction of rights based upon a trial court's mistaken application of the *Crane* doctrine as surely as similar review protects a defendant's established constitutional rights in any event.

c. The Rule in *Crane* is Supported by Sound Policy Considerations.

First, the rule enhances the likelihood of a correct determination of voluntariness as a matter of law. If petitioner's approach were constitutionally required, all circumstances surrounding all confessions would be submitted to the jury. The only difference between the orthodox and Massachusetts rule would then be that

with the Massachusetts procedure the jury is charged that they can exclude the confession if they find it was not voluntary. Although petitioner argues that the Court should declare the orthodox rule unconstitutional, an issue not raised below,[14] it is the Massachusetts rule which is the more constitutionally suspect of the two. As one commentator has noted, the "second-guessing" of the trial judges' voluntariness ruling, inherent in the Massachuetts rule,

> gives rise to some problems. Since the trial judge need only satisfy himself that the confession is admissible on the basis of a preponderance of the evidence and he knows that, whenever he decides to admit the confession, the defendant may insist that the issue also be tried to the jury, there may develop a tendency to allow the confession to be received, thus undermining to some extent the protection which *Jackson* sought to insure. Moreover, where the issue of voluntariness is tried to the jury, a conviction thereafter raises the same difficulty of review which *Jackson* sought to obviate — the difficulty of deciding whether a possibly involuntary confession affected the jury's verdict.[15]
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> 1 Louisell and Mueller, *Federal Evidence* § 34, at 251-252 (1977).

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[14]See respondent's Argument I.B., *infra.*

[15]In *Schneble* v. *Florida,* 405 U. S. 427 (1972) the Court split over the harmlessness of a *Bruton* error where the issue of voluntariness was presented to the jury. The majority assumed the jury must have found the confession voluntary because if they had rejected it, there would have been insufficient evidence to convict. The dissent, drawing all reasonable inferences in favor of the defendant, assumed the confession was deemed involuntary by the jury, but that they convicted anyway.

If petitioner has his way, and all the circumstances of the confession bearing on voluntariness are routinely presented to the jury without the instruction, the same results will occur. It does not take much analysis to determine that where a jury is presented, on one hand, with a confession to the crime, and on the other, a one-sided inference that the confession was beaten out of the defendant, they will be discussing the effects of this "coercion" in the jury room with or without the instruction. Because the trial court is fully aware that this "second guessing" is going to occur in any event, the temptation will be to pass the confession along to the jury *pro forma,* undermining the injunction of *Jackson,* 378 U. S. at 391, that a criminal defendant is entitled to "a reliable and clear-cut determination of the voluntariness of the confession. . . ." By emphasizing the crucial role of the trial judge in the determination of voluntariness, the rule in *Crane* avoids this limitation of the Massachusetts rule. As the Court said in *Lego* v. *Twomey*, 404 U. S. at 490, speaking of the Massachusetts rule, "[w]e are not disposed to impose as a constitutional requirement a procedure we have found wanting merely to afford petitioner a second forum for litigating his claim."

Second, the Kentucky Supreme Court recognized in *Crane* that there may be difficulty in the separation of factors relating to voluntariness and credibility and felt this "separation is best vested in the hands of the trial judge and not in the minds of the jurors" (690 S. W. 2d at 755); (JA 72). This Court has previously

noted a "failure to distinguish between the discrete issues of voluntariness and credibility. . . ." *Jackson,* 378 U. S. at 387, n. 13. The issue is better left to the trial court.

Third, also recognized by the Kentucky Court in *Crane,* is the fact that the issue of voluntariness is a settled issue, no longer debatable except on appeal (690 S. W. 2d at 755); (JA 72). This consideration has been fully explored. Where the evidence is irrelevant to the jury's task, what *constitutional* purpose is served by its presentation to them?

Finally, the Kentucky Supreme Court recognized that during the "retrial" of a voluntariness hearing, were the defendant allowed to present to the jury "all" the circumstances surrounding the procurement of his confession, only *some* of the circumstances would actually be presented. Said the court:

> . . . the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with Miranda rights, etc. are excluded.
>
> *Crane,* 690 S. W. 2d at 755; JA 72

Even when the defendant takes the stand the scope of the State's inquiry may be limited. Petitioner, however, states that this danger is "unlikely to occur in any case" because the prosecution could rebut any inference of inexperience with evidence of prior convictions (Brief for Petitioner, at 33).

Petitioner is certainly correct in implying that the only way a prosecutor could demonstrate a defendant's familiarity and experience with the criminal justice system would be through a showing that a defendant had been arrested and/or interrogated and/or convicted previously. However, the rule in Kentucky is that no evidence of prior arrest, questioning, or conviction may be admitted where the witness does not testify. The narrowly drawn exception to this rule occurs where the prior conviction or other police activity is intrinsically linked to the case then being tried; as, for example, when a defendant has been previously convicted of the terroristic threatening of a murder victim. If a defendant in Kentucky does take the stand he may be asked only if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it.[16] The Kentucky Supreme Court was correct; there is no fair way to litigate the voluntariness of the confession of an experienced criminal before the jury. Yet this fact may play a crucial role in the voluntariness determination.

Finally, has petitioner really demonstrated the need for a rule of constitutional law requiring that all the circumstances (whatever the word "circumstances" may mean) of all confessions must be admitted because they are always, as a matter of constitutional law, relevant to the credibility of the confession? Consider the following hypothetical. A criminal defendant gives a

[16]See *Commonwealth* v. *Richardson*, Ky., 674 S. W. 2d 515 (1984).

detailed point-by-point description of a murder. It is known that there were no accomplices. There are only two possibilities. Either the defendant is:

1) the killer, or
2) an innocent party coached by police on the details of the crime.

Kentucky has no hesitation in stating that even if the police coached an innocent person anxious to confess to any crime, for psychological reasons, no Court would hold the confession voluntary. If the police forced the innocent party to repeat the details of the crime the answer is equally obvious. If the trial court rules the confession voluntary and admits it into evidence, *none* of the circumstances surrounding its procurement are relevant to credibility. To hold that a jury which, by law, must consider the confession as evidence is *constitutionally* required to consider the "circumstances" as bearing on credibility is, it appears to respondent, to challenge the adequacy of the suppression hearing and all appellate review. Only if petitioner shows that the mechanism of the suppression hearing and further review is inadequate can he demonstrate the need for a *per se* rule. What rights of the defendant are harmed in the above scenario? Petitioner has failed to provide a logical reason for the Court to support his claim. The decision of the Kentucky Supreme Court should be affirmed.

B. The Rule in *Crane* is Based Upon the Recognition That Different Evidence May Be Required to Decide a Question of Law Versus a Question of Fact. The Rule Does Not Force an Unconstitutional Choice Between the Exercise of Individual Constitutional Rights.

Petitioner is quite right when he states that the *Crane* rule recognizes a substantial distinction between the role of the jury in confession cases as opposed to some other types of cases. Respondent submits that the distinction is logical and proper.

Unlike other evidence, admissibility of a confession has nothing to do with its probative value. As this Court has stated:

> Our decisions . . . have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system — a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.
>
> *Rogers* v. *Richmond,* 365 U. S. 534, at 540-541.

This fundamental distinction is at the heart of the *Jackson* v. *Denno* concern that a jury cannot be relied upon to disregard trustworthy evidence and reject a coerced, albeit undeniably true, confession. *Jackson,* 378 U. S. at 382.

Miller v. *Fenton, supra* (decided Dec. 3, 1985), again underscored the uniqueness of confession cases and held that voluntariness is a question of law and that the subsidiary fact questions of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of voluntariness.

The foregoing demonstrates the error in petitioner's hypothetical about a defendant who wishes to show that he did not possess contraband discovered in a search. *Crane* would not prohibit a defendant from relitigating the fact of possession to the jury. The claim in the hypothetical is similar to the fundamental question in a confession case of whether the confession was made at all. *Crane* permits a defendant to introduce evidence ". . . relating to authenticity, reliability or credibility of the confession" (*Crane, supra,* at 755); (JA 72). When a defendant denies possessing contraband or making a confession attributed to him an issue of authenticity and credibility is raised. *Crane* specifically leaves such issues for the jury.

The same is true of petitioner's argument relating to identification questions. This Court has previously distinguished between confession and identification cases in *Watkins* v. *Sowders,* 449 U. S. 341 (1981). Unlike a confession, "[i]t is the reliability of identification evidence that primarily determines its admissibility. . . . (Citations omitted)." *Id.* at 347. In such cases the trial judge and jury are both making the same determination, i.e., the reliability of the identification. As respondent has explained, the question

of voluntariness has little or nothing to do with credibility. Binding the jury on the subsidiary facts involved in the voluntariness determination does not deny a defendant due process of law. *Miller* v. *Fenton, supra.*

Petitioner next complains that there is no distinction between facts relating to credibility and facts relating to voluntariness. The questions of location and length of detention and the defendant's character and background have been held material to voluntariness. *Fikes* v. *Alabama,* 352 U. S. 191 (1957). Factors such as the size of the room and number of police officers present at the interrogation have no relation to demeanor or credibility. What is there in the foregoing that relates to credibility? How do any of these factors contribute to an inaccurate confession? There was no dispute about those factors. Petitioner did not say that he was somehow misled in his statement by the sheer number of policemen or dimensions of the room.

As for his supposed low mentality, it was uncontroverted that the only deficiency related to academic standing (TH 36-37). Petitioner is a sophisticated delinquent (TH 39-40).[17]

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[17]Petitioner's oft repeated assertion that he was functioning at a third or fourth grade level (Brief for Petitioner 6, 7, 38) was not presented on avowal. It was not discussed as a factor relating to credibility when the trial court ruled (TE II 3-7; JA 27-30). Nor was the mentality of petitioner even mentioned in his state court brief. The issue is not properly before this Court. *Monks* v. *New Jersey,* 398 U. S. 71 (1970).

His only proven psychological aberration was a tendency to tell lies in order to appear important (TH 41-42). That facet of petitioner's character does relate to credibility and was fully explored during cross-examination of the officers through illumination of inconsistencies and errors in the statement.

The Kentucky Supreme Court stated the rationale behind the *Crane* rule as follows:

> The dangers inherent in admitting evidence before the jury concerning the circumstances attendant to taking the confession are obvious. We have previously spoken of the difficulty in separation of those factors relating to voluntariness and those relating to credibility, and feel this separation is best vested in the hands of the trial judge and not in the minds of the jurors. Second, the issue of voluntariness is a settled issue, no longer debatable except on appeal. Third, the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with Miranda rights, etc, are excluded.
>
> *Crane, supra,* at 755; JA 71-72.

The policies for insulating voluntariness from review by the jury stated above are reasonable. The rule serves the important goal of separation of the responsibilities of the trial court and jury. *Miller, supra,* holds that voluntariness is a question of law, and because it is a question of law the trial court's conclusion is entitled to no special deference even in federal court. *Id.,* at 8. A defendant's rights are fully protected by

the appellate process. Resubmitting the issue to the jury, therefore, is an exercise in futility. This Court has stated:

> *Duncan* v. *Louisiana,* 391 U. S. 145, (1968), which made the Sixth Amendment right to trial by jury applicable to the States, did not purport to change the normal rule that the admissibility of evidence is a question for the court rather than the jury. Nor did that decision require that both judge and jury pass upon the admissibility of evidence when constitutional grounds are asserted for excluding it. We are not disposed to impose as a constitutional requirement a procedure we have found wanting merely to afford petitioner a second forum for litigating his claim.
>
> *Lego* v. *Twomey,* 404 U. S. at 490.

The fact that some states permit a defendant to argue voluntariness to the jury does not mean that Kentucky's refusal to do so is constitutional error.

Petitioner begins by arguing that the excluded testimony, preserved on avowal, was probative to the credibility of his confession. By the end of his brief petitioner is arguing that it was error not to submit the voluntariness issue to the jury (Brief for Petitioner, at 40). By this petitioner attacks the orthodox rule itself, not just Kentucky's interpretation of it. Such a result is not possible in this case since the issue was raised neither at trial nor on appeal. The Kentucky Supreme Court was never asked to adopt the Massachusetts rule, which requires a voluntariness instruction to the jury. See, *Crane* v. *Commonwealth,* Ky., 690 S. W. 2d 753 (1985); JA 68-72.

This is not the only example of petitioner's stretching the appealable issue in the case at bar. Also argued is the constitutionality of the Kentucky Supreme Court's holding in *Crane* that the trial judge's determination of voluntariness is conclusive and binding on the jury. Petitioner states that this ruling "insulates the issue of voluntariness from application of the reasonable doubt standard by the jury at trial and therefore violates the Due Process Clause of the Fourteenth Amendment."[18] Brief for Petitioner, at 41. Again, the issue is not before the Court, not having been raised below. It *is* the identical issue raised and decided by the Court in *Lego* v. *Twomey,* 404 U. S. 477, 489 (1972).

Petitioner's final argument is that the *Crane* rule requires him to choose between rights. He claims that Kentucky law would permit a defendant who waives complaints about voluntariness to present all evidence surrounding procurement of the confession. Petitioner misunderstands Kentucky law.

In *Diehl* v. *Commonwealth,* Ky., 673 S. W. 2d 711 (1984), the defendant claimed a consent to search given by his wife was not voluntary. She was permitted to testify at trial but was precluded from testifying about the voluntariness of her consent. *Id.,* at 712. Based upon *Diehl,* whether or not a defendant challenges the voluntariness of his confession at a suppression hearing he will be permitted to present any and all evidence

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[18]Kentucky adopted a preponderance of the evidence standard for the voluntariness determination at the suppression hearing in *Tabor* v. *Commonwealth,* Ky., 613 S. W. 2d 133 (1981). The burden, of course, is on the prosecution.

relating to any issue except voluntariness. There is no dilemma involved.

Petitioner's own conflicting claims merely confuse the issue. The only question presented by this case concerns the propriety of the trial court's restriction of the evidence sought to be introduced by the petitioner when, in the judgment of the trial court, that evidence was irrelevant to the determination of petitioner's guilt or innocence. *Crane* v. *Commonwealth,* 690 S. W. 2d at 755; JA 71. As respondent has demonstrated, this distinction is justifiable where, at little or no cost to the criminal defendant, important State interests are served. The judgment of the Supreme Court of Kentucky should be affirmed.

II. IF KENTUCKY ERRED BY LIMITING THE ADMISSION OF EVIDENCE, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Should the Court decide that Kentucky violated Major Crane's constitutional rights by the restriction of defense counsel's cross-examination of the interrogating officers, summary reversal of Crane's conviction is not required. Instead, this case should be remanded to the Kentucky Supreme Court for a determination of prejudice.

In *Chapman* v. *California,* 386 U. S. 18 (1967), the Court firmly rejected the argument that all federal constitutional errors, regardless of significance to the specific case, must be considered inherently harmful. The Court reasoned that in the context of a particular case the perceived error may have had very little influence (if any) on the jury's verdict at trial, and that where a reviewing court may confidently say that no such effect occurred, the reversal of the conviction provides an unjustified windfall for the defendant. *Id.* at 21-24; *United States* v. *Hasting,* 461 U. S. 499, 508-509 (1983). Since *Chapman*, the Court has repeatedly reaffirmed the principle that an otherwise valid conviction will not be set aside if the constitutional error that occurred before or during trial was harmless.[19] Even a coerced confession may be harmless. *Harrington* v. *California,* 395 U. S. 250 (1969); *Milton* v. *Wainwright,* 407 U. S. 371 (1972).

Petitioner is left, therefore, with the notion that the error in this case was (and is) so egregious that it

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[19]The Court has before it the question of whether an erroneous restriction upon a defendant's opportunity to impeach an adverse witness can ever be harmless. *Delaware* v. *Van Arsdall,* No. 84-1279 (October term 1985). In the recent past the Court has applied the harmless error doctrine in *Rushen* v. *Spain,* 464 U. S. 114 (1983) (right to be present at trial); *United States* v. *Hasting, supra,* (improper comment on defendant's silence at trial, in violation of Self-Incrimination Clause); *Hopper* v. *Evans,* 456 U. S. 605, 613-614 (1982) (statute improperly forbidding court from giving a jury instruction on a lesser included offense in a capital case, in violation of Due Process Clause); *Moore* v. *Illinois,* 434 U. S. 220, 232 (1977) (admission of identification in violation of Sixth Amendment Counsel Clause); *Brown* v. *United States,* 411 U. S. 223, 231-232 (1973) (admission of out-of-court statement in violation of Sixth Amendment Confrontation Clause); *Milton* v. *Wainwright,* 407 U. S. 371 (1972) (admission of confession in violation of Sixth Amendment Counsel Clause); *Chambers* v. *Maroney,* 399 U. S. 42, 52-53 (1970) (admission of evidence obtained in violation of Fourth Amendment); *Coleman* v. *Alabama,* 399 U. S. 1 (1970) (denial of right to counsel at a preliminary hearing in violation of Sixth Amendment Counsel Clause).

strikes at the very heart of the concept of a fair trial and effectively eliminates all confidence in the verdict of that trial. This situation is not presented by the case at bar. Petitioner contends only that the trial court's ruling prevented him from developing for the jury the following circumstances: "to wit, evidence of the number of police officers who interrogated the petitioner; the length of the interrogation and the dimensions of the room in which the interrogation was conducted."[20]

In fact, the jury heard testimony about the length of detention prior to the confession. During his opening statement petitioner told the jury he would introduce evidence concerning the circumstances of the arrest and questioning which would show that the confession was not credible (JA 23-24).

At the trial evidence was introduced showing that Detective Branham was informed of the arrest at 6:15 p.m. He said he took the taped statement beginning at 7:50 p.m. (JA 31).[21] The foregoing evidence was more favorable to Crane than the actual facts warranted because it initially appeared that Crane might have been questioned during the entire hour and forty-five

[20]Brief for Petitioner, at 7. The avowal testimony of the interrogating officers, during which petitioner was able to ask *all* the questions he would have asked before the jury, appears at JA 45-52.

[21]Branham also said the confession began at 8:50 p.m. (JA 32). That time is undoubtedly a mistake. All witnesses repeatedly said the actual time was 7:50 p.m. (JA 6, 11, 46). Crane was handed over to social workers at 8:45 (JA 13). Any belief by the jury that questioning lasted an extra hour merely strengthens the harmless error argument.

minutes. In fact, Crane was arrested at 5:52 p.m. No questions were even asked until 6:08 p.m. (JA 3-4). Next, some twenty-five minutes were consumed by processing at the police station (JA 49). There were some questions on the way to the Youth Bureau. Another twenty-one minutes were required for paper work at the bureau. Burbrink said he did not finish processing Crane until 6:59 (JA 5). Based on the record Crane was questioned for less than an hour prior to the taped confession.

Evidence was also introduced showing that the only people present during the questioning were Crane and four other officers. Again the evidence presented to the jury was more favorable than the actual facts. There was no police plot to isolate Crane.

Uncontroverted evidence proved that police informed Crane's family at once of the arrest. An aunt told police at 5:52 p.m. that she and Crane's mother were on their way (JA 4). Testimony showed that police made numerous attempts to contact the family all evening (JA 7, 50-51).

Petitioner was also permitted to examine witnesses on the inconsistencies in the confession.[22] Discrepancies relating to whether money was taken (JA 33, 41-42; TE IV 54), whether it was possible for Crane to have heard or seen the victim trigger an alarm (JA 33, 41-43), the time of the crime (JA 38, 41) and the caliber of the murder weapon (*Id.*) were all discussed at

[22]The voluntariness and admissibility of this confession, as a matter of law, is not contested. The confession will be used against Major Crane at any retrial.

length. Vigorous defense arguments on these same points were made to the jury (TE VI 19-26).

The evidence aside from Crane's confession, such as his admission to his mother and the co-defendant's confession, thoroughly incriminated Crane. The avowal testimony on the size of the room was the only supposedly relevant evidence which the jury had not already heard.

In view of the amount of evidence that Crane was permitted to introduce and in view of the overwhelming evidence, the limits placed on defense evidence did not deny Crane a fair trial. *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937); *Gordon* v. *United States,* 344 U. S. 414 (1953); *Harrington* v. *California, supra.*

When this issue was first raised in the Kentucky Supreme Court the respondent argued harmless error.[23] However, because the Kentucky Supreme Court found that no error had been committed, it did not reach that issue in its opinion.[24] Nonetheless, should the Court decide that constitutional error has been committed, it should remand this case back to the Kentucky Supreme Court for a determination of prejudice.

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[23]*Crane* v. *Commonwealth,* Kentucky Supreme Court, No. 84-SC-407-MR, Brief for Appellee (June 20, 1984), at 15.

[24]*Crane* v. *Commonwealth,* Ky., 690 S. W. 2d 753 (1985).

CONCLUSION

For all the foregoing reasons the judgment of the Supreme Court of Kentucky should be affirmed, or, in the alternative, the case should be remanded to that Court for a determination of prejudice.

Respectfully submitted,

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No. 85-5238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAJOR CRANE, *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, *Respondent.*

On Writ Of Certiorari To The Supreme Court Of Kentucky

REPLY BRIEF FOR PETITIONER

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ARGUMENT

This brief is addressed to the respondent's arguments that the rule enunciated by the Kentucky Supreme Court is simply the "logical extension" of the orthodox rule and that any error committed was harmless and non-prejudicial.

It should be noted at the outset that the respondent views the petitioner's argument as challenging the constitutionality of the orthodox rule and advocating that juries be allowed to decide the voluntariness issue anew. The respondent's position is in large part premised on its misperception of the petitioner's argument.

First, the Petitioner's Brief does not contend that the orthodox rule is unconstitutional. It is only Kentucky's misapplication of that rule that has violated the petitioner's rights under the Sixth and Fourteenth Amendments. The rule adopted by Kentucky is founded on a belief that juries are incapable of making proper use of evidence. That notion is not supported by logic or experience.

Second, it is not the voluntariness of a confession that must be considered by juries in jurisdictions adhering to the orthodox rule. Rather, the jury must determine the reliability and credibility of the confession and the weight it is to be given. The jury cannot constitutionally be prohibited from fulfilling this traditional function simply because the same evidence establishes a confession's voluntariness as well as its credibility. As stated in the Petitioner's Brief, such restrictions are unconstitutional.

The argument headings set forth by the respondent will be utilized by the petitioner for the purpose of this reply.

IA

ARGUMENT THAT TRIAL COURT'S RULING DID NOT DENY DUE PROCESS OF LAW OR VIOLATE THE RIGHT OF CROSS-EXAMINATION.

The respondent's argument that no constitutional error occurred herein is premised on its erroneous belief that the rule enunciated by the Kentucky Supreme Court is a "logical extension" of the orthodox rule. The flaw in that argument lies in the fact that of the orthodox jurisdictions which have ruled on this particular issue, only Kentucky has sought to limit what evidence the jury hears as to the circumstances surrounding procurement of the confession. Indeed, the respondent has not refuted the Appendices attached to the Petitioner's Brief. The failure of other jurisdictions to construe and apply the orthodox rule in the manner undertaken by Kentucky strongly suggests that Kentucky's approach is not at all as logical as the respondent would have the Court believe.

A review of some of the decisions and statutes set out in Petitioner's Appendices A(1) and B(1) demonstrates the basic flaw underlying the respondent's argument.

While recognizing that the question of a confession's admissibility is one to be decided by the trial judge, the Florida Supreme Court in *Palmes* v. *State*, Fla., 397 So.2d 648 (1981) persuasively summarized the jury's role in considering a confession as evidence. The court held:

> Once a confession is admitted into evidence . . . the defendant is entitled to present to the jury evidence pertaining to the circumstances under which the confession was made. The reason for this rule is that it is the jury's function to determine the weight to be accorded the confession in determining guilt . . . *It is conceivable that a confession, freely and voluntarily given and therefore admissible, may be untrue.*

> *Therefore, the defendant must be allowed to tell the jury why he made it. Id.* at 653. Emphasis added.

In *State* v. *Hammler*, La., 312 So.2d 306 (1975), the Louisiana Supreme Court held:

> The jury is the arbiter of what weight or effect shall be given to a confession, and therefore, the jury must have before it all the circumstances under which the confession was made . . . In determining evidentiary weight, the jury must necessarily again weigh the factors which bear upon the voluntary character of the statement. It is from these circumstances that the jury may draw their conclusion for according evidentiary value to the statement. *Id.* at 310.

See also *State* v. *Romero*, N.C. App., 286 S.E.2d 903, 905 (1983). The jury must be permitted to hear evidence of the circumstances under which the confession was procured in order to determine its weight and credibility. *State* v. *Pursley*, Tenn., 550 S.W.2d 949, 950 (1977) citing *Wynn* v. *State*, 181 Tenn. 325, 329, 181 S.W.2d 332, 333 (1944). See also, *State* v. *Allen*, 29 Utah 2d 88, 505 P.2d 302, 304 (1973); *People* v. *Evans*, 85 Ill.App.2d 290, 230 N.E.2d 20, 22 (1967). The foregoing decisions recognize that evidence of a confession's voluntariness serves a dual purpose and that evidence relevant to a confession's credibility and the weight it is to be given by the jury cannot be excluded simply because it overlaps with the issue of voluntariness.

The Supreme Court of Mississippi in *Wilson* v. *State*, Miss., 451 So.2d 724 (1984), articulated a very thoughtful analysis of the issue presented herein.

> The admissibility of a confession . . . is to be distinguished from the issue of its credibility and its weight . . . '[T]he competency of a confession as evidence is for the court to decide as a matter of law, while the weight and credibility of a confession is for

> the jury to decide along with other testimony and physical evidence . . .'
>
> Once a confession is admitted into evidence, a defendant is entitled to submit evidence and have the jury pass upon the factual issues of its truth and voluntariness and upon its weight and credibility . . . [T]he jury may conclude that the confession, though found by the court to be voluntary, is untrue and not entitled to any weight . . . Confessions are not conclusive and may be weighed as to their credibility under the circumstances by the jury. This is a matter for the jury and not the court. *Id.* at 726.

The clear delineation that is made not only between the multiple purposes for which the same evidence may be considered, but also between the respective functions of the judge and jury, supports the petitioner's argument that he was constitutionally entitled to present evidence of his confession's credibility for the jury's consideration notwithstanding the fact that the same evidence was used to establish the confession's voluntariness.[1] Therefore, it cannot be found that the rule enunciated by Kentucky in the case at bar constitutes a "logical extension" of the orthodox rule.

Much of the respondent's argument in Part IA of its brief is devoted to an exegesis of the rationale underlying

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[1] The same delineation has also been codified by some states in their statutory schemes. See for example, 6 Mont. Code Ann. § 46-13-301 (1981). That statute requires a judge to determine the voluntariness of a defendant's confession or admission. Section (5) of the statute provides, "The issue of the admissibility of the confession or admission may not be submitted to the jury. If the confession or admission is determined to be admissible, the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission."

the exclusion of confessions from evidence. The respondent's examination of earlier authorities leads it to conclude that, "The scope of inquiry was by definition based upon the *reliability* or trustworthiness of the confession." (Respondent's Brief, p. 15; emphasis by respondent). Thus, the respondent argues that the function of the judge was different than it is now because the judge had to be concerned with the reliability of a confession as a factor in determining its admissibility (Respondent's Brief, p. 16). From its analysis of the further evolution of the law governing the admissibility of confessions, the respondent concludes that evidence surrounding the procurement of a confession can be excluded from the jury's consideration because it relates solely to the question of voluntariness, which is an issue independent of the confession's reliability and credibility.

Although the voluntariness of a confession is determined without regard for its truth or falsity,[2] that does not support the conclusion reached by the respondent. Indeed, it is even more imperative that the jury be apprised of all the circumstances surrounding the procurement of a confession because the judge does not consider the reliability of the confession in making a voluntariness determination. If the function of the judge in a voluntariness hearing is completely independent from a determination of the reliability of a confession, then it becomes even more important that the latter task be undertaken by the jury. The jury's traditional role in assessing the credibility of evidence is in no way diminished by an independent determination of a confession's voluntariness. As the Court has noted, "Nothing in *Jack-*

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[2] *Jackson* v. *Denno*, 378 U.S. 368, 376-377 (1964); *Lego* v. *Twomey*, 404 U.S. 477, 484-485 (1972).

son questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence." *Lego* v. *Twomey*, 404 U.S. 477, 486 (1972). Thus, the respondent's conclusion that evidence surrounding procurement of a confession cannot be considered by juries in determining its credibility and the weight it should be given, draws no support from the decisions of this Court.

Moreover, the respondent's position ignores the fact that the voluntariness determination serves a purpose that is entirely different from the jury's duty to weigh and assess the credibility of the evidence. See *United States* v. *Raddatz*, 447 U.S. 667, 679 (1980). The respondent's argument reflects the same mistrust of juries and their ability to properly use evidence that was articulated by the Kentucky Supreme Court. *Crane* v. *Commonwealth*, Ky., 690 S.W.2d 753, 754-755 (1985) (J.A. 71-72). There is no rational basis upon which to exclude evidence from the jury's consideration simply because a trial judge must put it to a different use than that of the jury. The weakness of the respondent's position is seen in the universal acceptance of the "multiple admissibility" rule. See I Wigmore, *Evidence*, § 13, p. 694 (Tillers Rev. 1983). The widespread recognition of that rule is a strong indication that juries possess the intelligence and sophistication to make proper use of evidence. Although the principle enunciated by the Kentucky Supreme Court in the case at bar may be deemed an extension of the orthodox rule, there is nothing logical about it because it not only abridges rights guaranteed by the Sixth and Fourteenth Amendments, but it also demeans the jury's role in a criminal trial.

Contrary to the respondent's assertion,[3] the petitioner is not seeking relitigation of the voluntariness issue. The respondent concedes that the petitioner is entitled to have the jury disbelieve the confession because "an impressionable child 'made up' a story to please the police." (Respondent's Brief, p. 18). Yet how can a jury properly determine the reliability of a confession without being fully apprised of the circumstances surrounding its procurement? While conceding the legitimacy of the petitioner's ultimate objective, the respondent's position deprives the petitioner of the only means by which he can attain his objective. Indeed, the restrictions urged by the respondent's position overlook the fundamental difference between the voluntariness issue and the determination of a confession's reliability and credibility. The former deals only with admissibility of evidence while the latter is an integral aspect of the search for the truth.[4] The limitations which the respondent seeks to impose upon the petitioner's ability to challenge the credibility of a confession unduly restrict his due process right to present a defense and his rights to trial by jury and confrontation and cross-examination. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California* v. *Trombetta*, ___ U.S. ___, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). The constraints urged by the

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[3] Respondent's Brief, pp. 18-19.

[4] This is, of course, the same distinction between the purpose of a suppression hearing and the trial itself.

respondent herein prevent the petitioner from presenting a "complete defense" and should, therefore, be rejected.

IA(a)-(c)

ARGUMENT THAT THERE IS NO PREJUDICIAL RESTRICTION OF RIGHTS GUARANTEED BY THE SIXTH AMENDMENT AND THAT THERE ARE SOUND POLICY CONSIDERATIONS UNDERLYING THE CRANE RULE.

The effect of the rule enunciated by the Kentucky Supreme Court is to exclude evidence of *all* circumstances surrounding procurement of a confession.[5] After acknowledging that evidence of voluntariness and evidence of credibility are difficult to separate, the Kentucky court, without providing any guidance by which to determine whether evidence pertains only to voluntariness or to credibility, removes the entire issue from the jury's consideration. *Crane*, 690 S.W.2d at 754-755 (J.A. 71-72). As noted above, this result is in part justified by the court's belief that jurors are incapable of making proper use of the evidence. *Id.* at 755. (J.A. 72). The Kentucky Supreme Court apparently limits evidence of credibility to mistakes of fact contained within the body of the confession. That categorization is unduly restrictive to the point of being unconstitutional because evidence surrounding the circumstances under which a confession is obtained is directly related to the confession's credibility and reliability. Surely evidence of the number of police officers present during an interrogation and the conditions under which the confession is procured is germane

[5] There can be no doubt that this is also the position advocated by the respondent. "If the trial court rules the confession voluntary and admits it into evidence, *none* of the circumstances surrounding its procurement are relevant to credibility." (Respondent's Brief, p. 29; emphasis by respondent).

to the issue of whether the confession is found by the jury to be credible and reliable. Such evidence cannot be constitutionally excluded on the ground that it also relates to a confession's voluntariness.

IB

ARGUMENT THAT CRANE RULE IS BASED UPON RECOGNITION THAT DIFFERENT EVIDENCE MAY BE REQUIRED TO DECIDE A QUESTION OF LAW VERSUS A QUESTION OF FACT.

On p. 31 of its brief the respondent seems to suggest that jury questions regarding a confession's authenticity and credibility arise only when a defendant denies making a confession. Such a notion cannot withstand constitutional scrutiny. A defendant's due process right to present a complete defense necessarily encompasses the ability to challenge not only the substance of the confession itself but also those aspects of the interrogation process which lend themselves to the issue of the confession's believability.

Common sense dictates that the circumstances surrounding procurement of a confession are indeed relevant to its credibility. If, as in the case at bar, there are substantial factual misstatements and inaccuracies in the confession itself, then there must be some explanation as to why those statements were made. One explanation which the petitioner unsuccessfully sought to present at trial, was that the circumstances surrounding the interrogation caused the petitioner, a sixteen year old boy, to make untrue statements in an effort to please the police. The ultimate question for the jury to decide was whether it could find the confession to be reliable and credible when it was obtained from a sixteen year old boy who was interrogated for an hour and forty minutes in an eight foot

by twelve foot, windowless room with several police officers present. (J.A. 23-24, 46-47, 49-50). An equally important issue was how much weight should be attributed to such a confession. Therein lies the significance of the evidence sought to be introduced by the defense. The relevancy of those facts to the issue of the confession's credibility is readily apparent.

The respondent correctly notes that the petitioner on p. 40 of his brief states that "the Sixth and Fourteenth Amendments are violated by a rule of law that precludes a defendant from submitting to the jury the issue of the voluntariness of his confession." That sentence, however, is in error and should have read that the Sixth and Fourteenth Amendments are violated where, as here, the jury is not permitted to hear evidence of the circumstances surrounding procurement of the confession for the purpose of assessing the credibility of the confession and the weight it is to be given. This is the position the petitioner has steadfastly maintained in his original brief and in this brief. The issue of whether the Constitution requires that a jury determine the voluntariness of a confession is not before the Court and is not the question presented in the case at bar. The petitioner did not intend p. 40 of his original brief to convey otherwise. While it is true that the same evidence may be used to establish not only a confession's voluntariness but also its credibility, a trial judge's independent determination of a confession's voluntariness cannot constitutionally preclude a jury from using the same evidence to determine its credibility and the weight it is to be afforded. For the reasons set forth in his original brief, the petitioner maintains that a defendant is stripped of his rights to present a complete defense, to be tried by a jury, and to confront and cross-examine the witnesses against him if the jury is prevented from

hearing evidence about the circumstances surrounding procurement of a confession simply because such evidence is used to establish the voluntariness of a confession.

As the petitioner noted in his original brief, the voluntariness of a confession and hence its admissibility is determined by the preponderance of the evidence standard. To exclude that evidence from the jury's function of determining the confession's credibility and weight effectively insulates that evidence from application of the reasonable doubt standard. This result stems directly from the *Crane* rule and is, therefore, an aspect of the case which can appropriately be brought to the Court's attention. The credibility of evidence is relevant to the issue of guilt or innocence.[6] Thus, a rule which does not subject such evidence to the reasonable doubt standard is unconstitutional.

Contrary to the respondent's assertion, *Lego* v. *Twomey* is not dispositive of the issue presented herein because that case held that the Constitution only requires the voluntariness of a confession be determined by a preponderance of the evidence. The credibility and weight to be given a confession by the jury is evidence to be subjected to the reasonable doubt standard.

II

ARGUMENT THAT ERROR IS HARMLESS BEYOND A REASONABLE DOUBT.

The harmless error standard articulated in *Chapman* v. *California*, 386 U.S. 18 (1967), places upon the prosecu-

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[6] In the context of discussing the distinction between a suppression hearing and a trial, the Florida Supreme Court has stated, "[T]he inquiry at the pretrial hearing on the admissibility of a confession is primarily the question of voluntariness; later, before the jury, the question is what weight to give the confession in determining guilt." *Palmes* v. *State*, 397 So.2d at 653.

tion the burden of establishing that the asserted error did not contribute to the defendant's conviction. In other words, it must be demonstrated that the error is harmless beyond a reasonable doubt. *Id.* at 24. The respondent cannot meet its burden in the case at bar.[7]

The evidence of guilt is not overwhelming. There was no physical evidence connecting the petitioner to the crime. (TE V 12, 31-33). The evidence of guilt consisted of the petitioner's confession, the statement of the co-defendant, George Howard Williams, the petitioner's uncle, and a statement allegedly made by the petitioner to his mother. (TE IV 8-19, 62).[8] This evidence cannot be deemed overwhelming. The theory of the defense was that the petitioner's confession was untrustworthy and

[7] In arguing that the error is harmless, the respondent cites *Harrington* v. *California*, 395 U.S. 250 (1969) and *Milton* v. *Wainwright*, 407 U.S. 371 (1972), for the proposition that even a coerced confession can constitute harmless error (Respondent's Brief, p. 37). The respondent misinterprets both cases.

Harrington found a violation of *Bruton* v. *United States*, 391 U.S. 123 (1968), to be harmless error, while the Court in *Milton* held a violation of *Massiah* v. *United States*, 377 U.S. 201 (1964), to constitute harmless error. Indeed, the Court in *Chapman* v. *California*, 386 U.S. 18 (1967), citing *Payne* v. *Arkansas*, 356 U.S. 560 (1958), noted that a coerced confession cannot be treated as harmless error because it is such a fundamental infringement of the right to a fair trial. *Chapman*, 386 U.S. at 23, n.8. That very point was also noted in *United States* v. *Hasting*, 461 U.S. 499, 508, n.6 (1983).

[8] Williams testified that he didn't know anything about the incident at the Keg Liquor Store. He said he told the police only what they wanted him to say (TE III 15-16). Mrs. Crane said she couldn't remember what she told the police (TE IV 56-57). In conformance with Kentucky procedure, police officers were then allowed to testify as to the substance of the statements made by Williams and Mrs. Crane (TE IV 8-19, 62). See *Jett* v. *Commonwealth*, Ky., 436 S.W.2d 788 (1969).

unreliable. To support this claim the defense presented evidence of factual inaccuracies and inconsistencies contained within the confession.[9] The doubt raised as to the credibility of the petitioner's confession to the police would likewise have raised doubts as to the believability of the statement he purportedly made to his mother because it was shown that the petitioner had a propensity to confess to crimes which he had not committed. (J.A. 4, 7, 9-10). Although Williams' statement implicated the petitioner as the person who killed the liquor store clerk (TE III 10-13), it has been previously noted in the Petitioner's Brief (p. 24) that Williams had obvious motivation to protect himself and depreciate the level of his culpability.[10] Beyond that, the credibility of the testimony of a convicted felon is inherently unreliable. (TE III 46-47).[11] The credibility of all of the foregoing statements is, therefore, in doubt. Accordingly, such evidence cannot be considered overwhelming.

The respondent argues that the error must be deemed harmless because most of what was excluded was eventually heard by the jury. (Respondent's Brief, pp. 38-39). The nature of this argument suggests that the respondent acknowledges the correctness of the point made in the Petitioner's Brief (p. 38, n. 28) that jurors would not find the confession to be untrustworthy because exclusion of evidence of the circumstances surrounding procurement

[9] *Crane* v. *Commonwealth*, Ky., 690 S.W.2d 753, 755 (1985); (J.A. 71).

[10] Williams received a twenty (20) year sentence in connection with the robbery at the liquor store (TE III, 47, 51-53).

[11] See *Cotton* v. *Commonwealth*, Ky., 454 S.W.2d 698 (1970), which was in effect at the time of trial in the case at bar; *Commonwealth* v. *Richardson*, Ky., 674 S.W.2d 515 (1984).

of the confession would prevent them from having an evidentiary foundation upon which to reach that conclusion. The respondent's harmless error argument is flawed in an even more fundamental respect because it fails to draw any distinction between mere general inferences a jury may draw during the course of a trial and evidence which is actually presented in the manner intended by the adversarial process.

To effectuate his right to present a defense, a criminal defendant must be allowed to present his case in a manner designed to guarantee that the jury has the opportunity to consider the evidence in terms of the theory of the defense. The right to present a defense is little more than a fiction unless defense counsel is provided a meaningful opportunity to effectively present evidence favorable to his client. This objective cannot be attained where, as here, evidence favorable to the defense may be only incidentally or tangentially disclosed in the course of presenting proof. In such situations, it can only be speculated what, if anything, the jury might have inferred or gleaned from all that was said and done in the courtroom. That anomalous situation hardly squares with the right to present a defense. Indeed, it is implicit within the right to present a defense that counsel be allowed to shape, mold and present the evidence in such a way that the jury is undoubtedly given the opportunity to apply it to the theory of the defense. A meaningful opportunity to effectuate the right to present a defense is affirmative in nature, i.e., counsel must be able to present his client's case so that it can be understood by the jury and considered in terms of the totality of the evidence. This is the essence of the adversarial system and thus operates as an assurance that trial by jury does indeed become a search for the truth.

The right to confront and cross-examine witnesses, as well as the right to present a closing argument,[12] are essential components of the right to present a defense. Here, the ruling of the trial court that the petitioner was precluded from challenging the credibility of his confession by introducing evidence that was equally relevant to the voluntariness issue, left defense counsel without the ability to effectively present his theory of defense. He was prevented from cross-examining police officers as to the circumstances surrounding procurement of the confession and he was denied the opportunity of arguing to the jury that such evidence and the reasonable inferences therefrom supported his theory that the confession was not worthy of being believed. Although defense counsel was permitted to present a defense based on the factual inaccuracies and misstatements contained in the confession, that only conveyed part of the defense to the jury. The petitioner was precluded from presenting a crucial aspect of his defense upon which the foundation and strength of the entire defense depended.

Unable to present his entire defense to the jury, the petitioner was forced to content himself with the hope that the jury would not only construct the remainder of his defense from what it heard in the court room but also draw the correct inferences therefrom. The right to present a defense cannot be relegated to a game of chance in which the defendant must hope that his case and the evidence in support thereof is properly considered by the jury.

The substantial infringement on the petitioner's right to present a defense and his right to fully confront and

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[12] *Herring* v. *New York*, 422 U.S. 853 (1975).

cross-examine witnesses prevents the error herein from being harmless beyond a reasonable doubt.

CONCLUSION

The arguments made by the respondent neither dissipate the strength of the arguments presented in the Petitioner's Brief nor justify affirmance of the decision of the Kentucky Supreme Court. Accordingly, the petitioner, Major Crane, respectfully urges the Court to adopt the constitutional rule advocated in his original brief and grant him the relief requested therein.

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ADDENDUM

ADDENDUM TO APPENDICES

Since the filing of his original brief, the petitioner has found that Montana, by operation of a state statute, should be included in the list of orthodox rule jurisdictions which admit into evidence the circumstances surrounding procurement of a confession. Accordingly, Montana should be included in Appendix A(1) making a total of twenty-seven (27) jurisdictions listed therein. The pertinent section of the Montana Statutes, i.e. 6 Mont. Code Ann. § 46-13-301 (1981) should be included in Appendix B(1).

It should also be noted that South Carolina, which is a Massachusetts rule jurisdiction, has recently re-affirmed its position in *State* v. *Drayton*, 337 S.E.2d 216 (S.C. 1985). The *Drayton* case should, therefore, be included in Appendix B(4).